DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-945
Title: Albert W. Florence, Petitioner
v.
Board of Chosen Freeholders of the County of Burlington, et al.
Docketed: January 24, 2011
Linked with 10A586
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (09-3603, 09-3661)
Decision Date: September 21, 2010
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 9 2010	Application (10A586) to extend the time to file a petition for a writ of certiorari from December 20, 2010 to January 19, 2011, submitted to Justice Alito.
Dec 10 2010	Application (10A586) granted by Justice Alito extending the time to file until January 19, 2011.
Jan 19 2011	Petition for a writ of certiorari filed. (Response due February 23, 2011)
Feb 23 2011	Brief of respondents Board of Chosen Freeholders of the County of Burlington, et al. in opposition filed.
Feb 23 2011	Brief of respondents Essex County Correctional Facility, et al. in opposition filed.
Mar 9 2011	DISTRIBUTED for Conference of March 25, 2011.
Mar 9 2011	Reply of petitioner Albert W. Florence filed. (Distributed)
Mar 28 2011	DISTRIBUTED for Conference of April 1, 2011.
Apr 4 2011	Petition GRANTED.
Apr 6 2011	Letter of substitution of counsel for respondents Essex County Correctional Facility, et al. received.
Apr 13 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 20, 2011.
Apr 13 2011	The time to file respondents' briefs on the merits is extended to and including August 19, 2011.
Apr 13 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner, and counsel for the respondents.
Jun 20 2011	Joint appendix filed.
Jun 20 2011	Brief of petitioner Albert W. Florence filed.
Jun 24 2011	Brief amici curiae of Former Attorneys General of New Jersey Robert J. Del Tufo, et al. filed.
Jun 27 2011	Brief amicus curiae of American Bar Association filed.

Jun 27 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 27 2011	Brief amici curiae of Medical Society of New Jersey, et al. filed.
Jun 27 2011	Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project, et al. filed.
Jun 27 2011	Brief amici curiae of Current and Former Jail and Corrections Professionals filed.
Jun 27 2011	Brief amici curiae of Psychiatrists filed.
Jun 27 2011	Brief amicus curiae of National Police Accountability Project filed.
Jun 27 2011	Brief amici curiae of Academics on Gang Behavior filed.
Jun 27 2011	Brief amici curiae of Sister Bernie Galvin, et al. filed. (Distributed)
Jul 15 2011	CIRCULATED.
Jul 19 2011	SET FOR ARGUMENT ON Wednesday, October 12, 2011.
Aug 11 2011	Brief amici curiae of National Sheriffs' Association, et al. filed. (Distributed)
Aug 12 2011	Brief amici curiae of County Commissioners Association of Pennsylvania filed. (Distributed)
Aug 17 2011	Record from U.S.C.A. for 3rd Circuit is electronic.
Aug 19 2011	Brief of respondents Essex County Correctional Facility and Essex County Sheriff's Department filed. (Distributed)
Aug 19 2011	Brief of respondents Board of Chosen Freeholders of the County of Burlington, et al. filed. (Distributed)
Aug 23 2011	Brief amici curiae of Atlantic County and Gary Merline filed. (Distributed)
Aug 25 2011	Brief amici curiae of Policemen's Benevolent Association, et al. filed. (Distributed)
Aug 25 2011	Brief amici curiae of City and County of San Francisco, et al. filed. (Distributed)
Aug 26 2011	Brief amicus curiae of the United States filed. (Distributed)
Aug 26 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 26 2011	Brief amici curiae of Texas Association of Counties, et al. filed. (Distributed)
Aug 26 2011	Brief amicus curiae of New Jersey County Jail Wardens Association filed. (Distributed)
Aug 26 2011	Brief amicus curiae of DRI filed. (Distributed)
Aug 26 2011	Brief amici curiae of Michigan and 11 Other States filed. (Distributed)
Aug 26 2011	Brief amicus curiae of Cook County filed. (Distributed)
Aug 26 2011	Brief amicus curiae of Maine County Commissioners Association filed. (Distributed)
Aug 26 2011	Motion for divided argument filed by respondents.
Sep 12 2011	Record from U.S. District Court for the District of New Jersey is electronic.
Sep 19 2011	Reply of petitioner Albert W. Florence filed. (Distributed)
Sep 27 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 27 2011	Motion for divided argument filed by respondents DENIED.
Oct 12 2011	Argued. For petitioner: Thomas C. Goldstein, Washington, D. C. For respondents: Carter G. Phillips, Washington, D. C.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 10-1045

JAN 10 2011

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Albert Florence respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A) is published at 621 F.3d 296. The opinion of the United States District Court for the District of New Jersey finally resolving petitioner's Fourth Amendment claim (App. D) is published at 595 F. Supp. 2d 492. The district court's opinion certifying that decision for immediate

appeal (App. C) is published at 657 F. Supp. 2d 504. The court of appeals' order accepting jurisdiction over the appeal (App. B) is unpublished.

JURISDICTION

The court of appeals issued its opinion on September 21, 2010. App. 1a. Justice Alito subsequently extended the time to file this petition to and including January 19, 2011. App. 10A586. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

Petitioner was arrested for a minor, non-criminal offense. Respondents twice strip-searched him at two different jails, even though neither the nature of the offense nor the circumstances in which he was arrested suggested that petitioner might be carrying contraband. Petitioner subsequently filed this suit, alleging that respondents' conduct violated the Fourth Amendment. The district court granted petitioner summary judgment, finding no evidence that a practice of searching all arrestees without regard to the circumstances materially aids in detecting or deterring unlawful activity. The court of appeals reversed by a divided vote, holding as a matter of law that such a policy is consistent with the

Fourth Amendment and need not be supported by any evidentiary basis. The majority recognized that its ruling was consistent with decisions of two circuits but squarely conflicted with the precedent of eight others.

1. Petitioner Albert Florence lives in Burlington County, New Jersey, with his wife April and their three children – Shamar, William, and Elijah. He is employed as a finance director of a New York car dealership.

On Thursday, March 3, 2005, April (then pregnant) was driving Mr. Florence and Shamar (then four years old) in the family's BMW sport-utility vehicle to her mother's home for dinner. A New Jersey State Trooper stopped the vehicle in Burlington County for a traffic infraction. Florence identified himself as the vehicle's owner. The officer conducted a records search, which reported that Florence was the subject of an outstanding bench warrant in Essex County, New Jersey.

The basis for the warrant was that Florence had supposedly failed to pay a fine. Florence presented to the officer a copy of the official document confirming the fact that he had already paid the fine. (Florence kept the letter accessible because in his view he had been pulled over in the past by the police as an African American who drove nice cars.)

The officer did not attempt to verify the accuracy of the letter or otherwise confirm that Florence was actually wanted for arrest. Without any reason to believe that Florence was engaged in ongoing criminality, the officer arrested him – handcuffed him, placed him in the squad car, and transported

him to the State Police Barracks. The officer did not issue a traffic citation.

Concerned for his wife, child, and responsibilities at work, Florence pleaded with the officers at the police barracks to confirm the validity of the warrant. They refused, asserting that only the police in Essex County, which issued the warrant, bore that responsibility. Florence was then transported in handcuffs to the local detention facility – the Burlington County Jail – to be held until he was retrieved by Essex County, which supposedly would occur the next day.

2. Florence's ostensible offense – failure to pay a fine – constitutes civil contempt in New Jersey; it is not a crime. App. 3a, 51a. New Jersey strictly limits strip searches of individuals who are jailed after being "detained or arrested for commission of an offense other than a crime," N.J. Stat. § 2A:161A-1 (App. 101a), a category that includes all "non-indictable offense[s]," N.J. Admin. Code § 10A:31-1.3 (2010) (App. 105a); *see also* App. 53a n.3. These individuals "shall *not* be subjected to a strip search" – defined as "the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts" – in the absence of a search warrant, consent, or at least reasonable suspicion that the individual possesses contraband, N.J. Stat. § 2A:161A-1 (App. 101a) (emphasis added); *id.* § 2A:161A-3 (App. 102a), or a history of violence or a prior criminal conviction, N.J. Admin. Code § 10A:31-8.5(b)(6) (App. 108a).

The stated policies of the Burlington County Jail conform to New Jersey law. "A person who has been detained or arrested for commission of an offense

other than a crime . . . shall *not* be subject to a strip-search unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found." Burlington County Detention Center/Corrections & Work Release Center Policies and Procedures: Search of Inmates § 1186 (emphasis added) (App. 126a).

Neither the nature of the offense for which Florence was detained nor the circumstances in which he was arrested gave respondents any reason to suspect that he might have possessed weapons, drugs, or any other contraband at the time he was admitted to the Burlington County Jail. Officers nonetheless required him to strip naked for inspection by an officer, pursuant to "Burlington Jail's custom and practice, which every corrections officer follows." App. 55a. Florence was taken to an eight-foot-long stall with a partially opened curtain. The officer removed Florence's handcuffs and ordered him to "take off all [his] clothes." Florence Dep. 69, Dec. 22, 2006. Sitting at an arm's length away, the officer directed Florence to open his mouth, lift his tongue, and lift his arms. The officer required Florence to turn around so that he could examine Florence's backside. The officer finally ordered Florence to turn back around and lift his genitals for inspection.

Florence was held in the Burlington Jail for six days. During that lengthy period, neither Burlington nor Essex made any effort to inquire whether he was actually wanted for arrest. Nor did they present Florence to a magistrate judge to determine whether there was a basis to hold him. *See* N.J. Ct. R. 3:4-1(b) (bail must be set for persons arrested pursuant

to a warrant "without unnecessary delay, and no later than 12 hours after arrest"); *id.* R. 3:4-2(a) (if a detainee remains in custody, he "shall be brought before a judge for a first appearance . . . within 72 hours after arrest, excluding holidays"). Throughout this detention, jail personnel also refused to permit Florence to shower, or to provide him with a toothbrush, toothpaste, or soap.

The efforts of Florence's family to secure his release were foiled. April sought the assistance of the East Orange, New Jersey, office that had been responsible for issuing the fine, but the clerk directed her to go to the Newark courthouse. She sought help there, but the clerk of that court directed her to go to the Trenton courthouse. The most that she could secure in Trenton was additional paperwork confirming, yet again, that Florence had in fact paid the fine underlying the erroneous warrant. She then retained a lawyer, who continued the effort to secure his release.

3. After nearly one week, Florence was finally transferred to the Essex County Correctional Facility. At that time, the policy of that facility was that all arriving arrestees – without regard to the basis for their arrest – were to be strip-searched, with officers "observ[ing] carefully while the inmate undresses," examining the arrestee's mouth; ears, nose, hair, and scalp; fingers, hands, arms, and armpits; and all body openings and the inner thighs. Essex Department of Public Safety General Order No. 89-17 (App. 141a). (Soon after Florence's arrest, the Facility coincidentally changed its policy to conform to New Jersey law and limit strip searches of individuals arrested for minor offenses. *See* App.

58a; *see also* Essex County Jail Intake Policies (2007) (App. 145a).)

Jail personnel ordered Florence and four other detainees to enter a shower area together and strip as a group. Naked and under the close observation of two officers and in the plain sight of each other and other persons traveling through the room, the five detainees were all ordered together to open their mouths, lift their genitals, and then turn around, squat, and cough.

The next day, Thursday, officers transported Florence with a group of other inmates to the Essex County Courthouse. Florence's attorney appeared before a judge, who was "appalled" that a warrant ever existed for Florence's arrest in the first place and ordered his immediate release. Florence Dep. 139.

4. Florence subsequently filed this lawsuit pursuant to 42 U.S.C. § 1983 against municipal officials and various persons involved in his arrest and the two suspicionless strip searches. Among other claims, Florence alleged that (notwithstanding state law and their own stated policies) respondents engaged in a pattern or practice of conducting strip searches that were unreasonable under the Fourth Amendment because neither the nature of the offense nor the circumstances of the arrest gave rise to any reason to suspect that the detainee might be carrying contraband when he arrived at either jail. The district court certified a class of individuals who, during a specified period, had been subjected to a suspicionless strip search at the Burlington and Essex County facilities when detained for minor offenses. *Florence v. Bd. of Chosen Freeholders of*

the County of Burlington, No. 05-3619, 2008 WL 800970, at *17 (D.N.J. Mar. 20, 2008). Over the course of three years of litigation, the parties undertook extensive discovery, exchanging documents and conducting depositions of Florence and numerous employees of the jails.

The district court granted petitioner summary judgment. The court held that the Fourth Amendment forbids a suspicionless strip search of an individual arrested for a minor offense, if neither the nature of the offense nor the circumstances of the arrest create some reason to suspect the individual may be carrying contraband. App. 87a. The court contrasted this case with *Bell v. Wolfish*, 441 U.S. 520 (1979), which considered challenges to various procedures at the Metropolitan Correctional Center (MCC) in New York City. As is relevant here, MCC officials had determined not to engage in "close and constant monitoring of contact visits" between inmates and persons outside the institution "to avoid the disruption of the confidentiality and intimacy that these visits are intended to afford." *Id.* at 560 n.40. Instead, after every such contact visit, the inmate was required to "expose [his] body cavities for visual inspection as a part of a strip search." *Id.* at 558. Jail officials defended the policy on the ground that such direct contact between inmates and outsiders, which occurred without immediate oversight by jail personnel, could be used to smuggle contraband into the facility. *Id.*

This Court rejected the plaintiff-inmates' broad claim that a strip search cannot "*ever* be conducted on less than probable cause." *Id.* at 560 (emphasis in original). The Court held that the case instead called

for "a balancing" of several factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559. The Court did "not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. On the other hand, such a facility presents "serious security dangers." *Id.* at 559. This Court accepted the jail officials' submission that the searches were generally reasonable under the Fourth Amendment because, in the circumstances of that case, they were "necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution," which could be coordinated through contact visits. *Id.* at 558. It concluded that "under the circumstances, we do not believe that these searches are unreasonable." *Id.*

In this case, the district court recognized that "a circuit split has developed" over whether *Bell*'s authorization to conduct strip searches after planned and loosely supervised contact visits extends more broadly to permit such searches of all individuals upon their admission to a jail for any minor offense, whatever the circumstances. App. 73a. Upon considering the conflicting lines of decisions, the district court agreed with the "overwhelming weight of authority," *id.* 87a – the "eight circuits [that] presently agree that reasonable suspicion must be present before a strip search is conducted" of persons arrested for minor offenses, who logically would not be coordinating the smuggling of contraband, *id.* 72a. On the other hand, the district court specified that a policy which more narrowly "mandates strip searches

for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such [a] policy contains an implicit recognition of reasonable suspicion, albeit a general one." *Id.* 70a.

The district court reasoned that a strip search is inherently a significant intrusion on personal privacy. *Id.* 72a. Moreover, in Essex County, the search took "place in the presence of other inmates, which further contributes to the humiliating and degrading nature of the experience." *Id.* 84a. With respect to the interests of the government, a policy categorically requiring a strip search of all individuals arrested for minor offenses illogically fails to consider both the nature of the offense (such as whether narcotics or weapons were involved) and the identity of the offender (treating "a hypothetical priest or minister" the same as "a gang-member arrested on an allegation of drug charges"). *Id.* Finally, the district court found it compelling that respondents failed to submit any evidence that would support their claims "of a smuggling problem" by individuals arrested without warning for minor offenses. *Id.* 85a. "Such a surprise [in being arrested for a minor offense] does not give the arrestee an opportunity to plan a smuggling enterprise, unlike an admitted inmate who has knowledge of a forthcoming contact visit." *Id.* 79a.

5. Having conclusively resolved petitioner's claims under the Fourth Amendment, the district court certified its order awarding Florence summary judgment for appeal; the Third Circuit accepted the certification and reversed by a divided vote. *Id.* 7a, 17a. The court of appeals held that the Fourth

Amendment permits a general policy of suspicionless strip searches upon admission to jail, whatever the circumstances, and concluded that respondents must be granted judgment as a matter of law even in the absence of any evidence that such a policy would detect or deter illegal activity.

From the outset, the court of appeals (like the district court) recognized the "clear dichotomy" between decisions of eight circuits invalidating such blanket strip-search policies and the contrary rulings of two other circuits upholding them. *Id.* 2a. The Third Circuit elected to join the minority view of this "circuit split." *Id.* 17a, 21a.

The majority opinion concluded that its holding was compelled by this Court's decision in *Bell*. The majority rejected the district court's conclusion that, unlike the contact visits in *Bell*, an arrest for a minor offense does not – without more – present the recurring prospect of a coordinated effort to smuggle materials into the facility. "Even assuming that most such arrests are unanticipated, this is *not always* the case. It is *plausible* that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." *Id.* 23a (emphases added).

The majority recognized that respondents had presented no "evidence regarding discovery of contraband on indictable and non-indictable offenders during intake, [or] the incidence with which gang members are arrested for non-indictable offenses." *Id.* 25a. Moreover, respondents had "not presented *any* evidence of a past smuggling problem or *any* instance of a non-indictable arrestee

attempting to secrete contraband." *Id.* 24a-25a (emphases added). But it read this Court's decision in *Bell* "to conclude that the Jails are not required to produce such a record." *Id.* 25a.

District Judge Pollak (sitting by designation) dissented. He would have found it unreasonable to conduct intrusive strip searches of "any citizen who may be arrested for minor offenses, such as violating a leash law or a traffic code, and who pose[s] no credible risk for smuggling contraband into the jail," particularly in the absence of "a single document[ed] example of anyone doing so with the intent of smuggling contraband into the jail." *Id.* 30a (quoting *Bull v. City & County of San Francisco*, 595 F.3d 964, 990 (9th Cir. 2010) (en banc) (Thomas, J., dissenting)). Judge Pollak concluded that it was implausible that individuals would with any regularity "deliberately commit minor offenses such as civil contempt – the offense for which Florence was arrested – and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries." *Id.* 31a n.1.

6. This petition followed.

REASONS FOR GRANTING THE WRIT

This case perfectly fits the criteria for this Court's review. The lower courts resolved the case by taking contrasting sides on a widely acknowledged eight-to-three circuit split. Only this Court can resolve that conflict, which is rooted in irreconcilable interpretations of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). Review is also warranted because the ruling below cannot be

reconciled with this Court's Fourth Amendment precedents, which hold that such an intrusive search is reasonable only if there is some basis to suspect that the individual is engaging in some form of illegality, such as smuggling contraband.

Contrary to the view of the majority below, *Bell* does not compel a contrary result. Whereas *Bell* involved loosely supervised contact visits that were arranged with individuals outside the jail, it is far less likely that contraband will be smuggled when an individual is arrested without warning for a minor offense. The jail's interest in security moreover can be met through less intrusive searches of admittees.

Finally, this case is an ideal vehicle in which to resolve the question presented, because the parties compiled an extensive record and because the lower courts resolved the case entirely as a matter of law, and only on the basis of this single issue. Certiorari accordingly should be granted.

I. The Circuits Are Irreconcilably Divided Over Whether The Fourth Amendment Permits A Jail To Conduct A Suspicionless Strip Search Of Every Individual Arrested For Any Minor Offense, Whatever The Circumstances.

The Third Circuit held in this case that a jail may strip-search every individual arrested for any offense in any circumstance. Both the court of appeals and the district court recognized that the circuits are squarely divided over that question. App. 17a, 42a. Judge Kozinski has similarly written that the question whether the Fourth Amendment permits blanket strip searches of non-indictable offenders is an "interesting and difficult question"

that requires "guidance from the Supreme Court – which is entirely absent." *Bull v. City & County of San Francisco*, 595 F.3d 964, 982, 988 (9th Cir. 2010) (en banc) (concurring opinion). Relatedly, Judge Cabranes has explained that the question of how much deference the Fourth Amendment affords to jail officials in this specific context "calls out for resolution by the Supreme Court." *Shain v. Ellison*, 273 F.3d 56, 70 (2d Cir. 2001) (dissenting opinion). Further percolation of the question presented would serve no purpose, as the lower courts (like the Third Circuit in this case) now merely choose "which line of cases [they view as] more faithful to the Supreme Court's decision in *Bell*." App. 2a-3a.

Eight circuits have thus held that blanket strip searches of individuals arrested for non-indictable offenses violate the Fourth Amendment.[1]

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[1] *See Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) (reasonable suspicion is required "when the inmate has been charged with only a misdemeanor involving minor offenses or traffic violations, crimes not generally associated with weapons or contraband"); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) ("We hold that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest."); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (when an individual is held for a minor offense not associated with possession of weapons or contraband and there is no individualized suspicion, "[a]n indiscriminate strip search policy routinely applied to [these] detainees . . . cannot be constitutionally justified simply on the

The Third Circuit in this case rejected that entire line of authority. App. 13a. It instead adopted the opposite position of the Ninth and Eleventh Circuits.[2]

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basis of administrative ease in attending to security considerations"); *Jimenez v. Wood County, Texas*, 621 F.3d 372, 375-76 (5th Cir. 2010) (quoting *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir. 1985) ("Because Lubbock County's strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such searches unreasonable and the policy to be in violation of the Fourth Amendment.")), *reh'g en banc granted*, No. 09-40892, 2010 WL 4672930 (5th Cir. Nov. 18, 2010); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) ("[A]uthorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail."); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1266, 1273 (7th Cir. 1983) (when detainees were arrested for "traffic, regulatory, or misdemeanor" offenses, "ensuring the security needs of the City by strip searching plaintiffs-appellees was unreasonable without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed"); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (holding that "security cannot justify the blanket deprivation of rights of the kind incurred here" when a detainee charged with a misdemeanor was subjected to strip and cavity searches); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (finding strip search unconstitutional when neither traffic violation nor individualized factors indicated arrestee might possess weapons or contraband).

[2] *Id.* 21a; *Bull v. City & County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc) (finding a policy of strip-searching all detainees who enter the jail's general population is

Only a decision of this Court can provide the uniform protection from unreasonable searches promised by the Fourth Amendment. The circuits are not only hopelessly divided, but that conflict is rooted in irreconcilable interpretations of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). *Compare, e.g.*, App. 22a ("*Bell* did not require individualized suspicion for each inmate searched"), *with Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001) ("[I]n the context of prisoners held in local jails for minor offenses, the *Bell* balance requires officers to have a reasonable suspicion that a particular detainee harbors contraband prior to conducting a strip or visual body cavity search"). Certiorari should be granted to resolve that conflict.

II. The Ruling Below Conflicts With This Court's Fourth Amendment Jurisprudence.

A. This Court's Precedents Require Individualized Suspicion To Justify The Significant Intrusion Of A Strip Search Of An Individual Arrested For A Minor Offense.

Strip searches deprive an individual of the most tangible protection of his intimate personal privacy –

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constitutional "because the circumstances before us are not meaningfully distinguishable from those presented in *Bell*"); *Powell v. Barrett*, 541 F.3d 1298, 1307 (11th Cir. 2008) (en banc) ("The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection.").

his clothing. The search forces the individual to expose parts of his body that our society by law requires be kept from public view, and that as an adult he may never have previously revealed to anyone other than an intimate partner in a bedroom and medical professionals. The display is made before complete strangers, in forced circumstances that can suggest nothing other than that the individual is suspected of significant criminality. Whereas other privacy interests considered under the Fourth Amendment often involve the individual's desire to exclude the *government* from spheres that are in some sense public because they are open to friends and associates – such as a home or a car – a strip search demands the dramatically more significant forced exposure of intimate details that the individual may have throughout his life withheld from *almost everyone*.

As this Court recently explained, "[t]he meaning of [a strip search], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Then-Judge Breyer previously noted that "all courts that have considered the issue [have recognized] the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities." *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983).[3] The Third Circuit in this case itself

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[3] *See also, e.g., Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (describing strip searches as an "extreme intrusion upon

acknowledged that a strip search constitutes an "extreme intrusion on privacy." App. 19a.

Such a gross invasion of personal privacy directly implicates the Fourth Amendment's guarantee against "unreasonable" searches. The Amendment's "overriding function" is to "protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). This Court's jurisprudence effectuates the Amendment's requirements by "generally requir[ing] a law enforcement officer to have probable cause for conducting a search." *Redding*, 129 S. Ct. at 2639. Depending on the circumstances, a search may be reasonable on a lesser standard of proof, such as reasonable suspicion, but *some* individualized basis

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personal privacy, as well as an offense to the dignity of the individual" (citation and internal quotation marks omitted)); *Weber*, 804 F.2d at 802 ("so intrusive and demeaning"); *Mary Beth G.* 723 F.2d at 1272 (7th Cir. 1983) ("demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission" (citation and internal quotation marks omitted)); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute." (citation and internal quotation marks omitted)); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) ("There can be no doubt that a strip search is an invasion of personal rights of the first magnitude."); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) ("It is axiomatic that a strip search represents a serious intrusion upon personal rights.").

to intrude upon personal privacy is nonetheless generally required. *E.g.*, *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (recognizing "the Fourth Amendment's normal requirement of individualized suspicion"); *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968) ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."). Individualized suspicion is not required only "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).[4]

Under these basic principles, it is unreasonable under the Fourth Amendment for jail officials to engage in the deep intrusion into personal dignity of a strip search of every single individual admitted into the facility, no matter what the circumstances. Such a search may be justified either if the nature of the offense creates a reason to suspect that the individual may possess contraband (such as an offense involving weapons or drugs), or if the circumstances of the arrest provide some reason to believe that the

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[4] Although the protections of the Fourth Amendment in jail may be still further diluted for individuals who are incarcerated after having been duly convicted of crimes, Florence was merely an arrestee. *Cf. McKune v. Lile*, 536 U.S. 24, 36 (2002) ("A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction.").

individual may be attempting to smuggle materials into a jail (such as an individual submitting himself to a voluntary detention). In addition, petitioner does not challenge New Jersey's authorization of such a search for individuals who have a history of violence or a prior criminal conviction.

But this is not such a case. Although petitioner was not even arrested for a criminal offense, he was nonetheless subjected to a search that was deeply intrusive of his personal privacy. Neither the nature of petitioner's offense (failure to pay a fine) nor the circumstances of the arrest (a traffic stop, at which petitioner strongly protested being detained) remotely supports the supposition that petitioner was carrying contraband in his underwear, much less that he was doing so in an attempt to smuggle something into a jail. Respondents do not contend otherwise. Yet despite the absence of *any* reason to believe that he might possess contraband, petitioner was twice required to strip entirely naked, lift his genitals, and turn around to have his entire body closely examined by complete strangers. Because none of the justifications for conducting strip searches in the absence of individualized suspicion exists here, the intrusive search of Florence was unreasonable and violated his rights under the Fourth Amendment.[5]

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[5] The search of petitioner in the Essex Jail raises additional Fourth Amendment concerns. Even when otherwise consistent with the Fourth Amendment, a strip search of a jail inmate "must be conducted in a reasonable manner." *Bell*, 441 U.S. at 560. In the Essex facility, however, the search was

It finally bears emphasizing that even absent sufficient suspicion to justify a strip search, jail officials have significant discretion to protect their legitimate interests in the integrity and security of their institutions through less intrusive searches that preserve the individual dignity of persons who have been arrested for minor offenses. No court doubts the authority of jail officials to require that all detainees be screened through a metal detector, then disrobe and appear in their undergarments.[6] Modern technologies, such as the Body Orifice Scanning System and full body scanners, provide additional mechanisms to detect contraband without requiring that the individual strip naked. *See* Charlie

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unnecessarily public: petitioner was required to stand naked, turn around, and lift his genitals before four other inmates, multiple officers, and other persons walking through the room. Petitioner was not only stripped naked, but he was further required to crouch and cough to expel anything in his anus. As the district court recognized, the searches took "place in the presence of other inmates, which further contributes to the humiliating and degrading nature of the experience." App. 84a. Respondents offered no justification for significantly magnifying the intrusion of the search by conducting it in such public circumstances.

[6] *See, e.g., Roberts v. Rhode Island*, 239 F.3d at 112 ("lacking reasonable suspicion that an individual is hiding contraband, Rhode Island could still search that person's clothes, a far less intrusive procedure"); *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984) ("Of course, the County remains free to enhance its security by implementation of procedures that are less intrusive than strip searches, including the use of pat down searches and metal detectors and the segregation of inmates to isolate arrestees for minor offenses from the general jail population.").

Wojciechowski, "Whole Body Scans Nothing New to Jail Inmates," *NBC Chicago* (police chief explaining that the shift by Cook County Department of Corrections to full-body scanners for searches is "fantastic" and that "[w]e've gotten away from strip searches"), *available at* www.nbcchicago.com/news/local-beat/cook-county-jail-body-scans-85552562.html.

B. The Third Circuit's Reliance On This Court's Decision In *Bell v. Wolfish* Is Misplaced.

Respondents do not dispute that the strip searches in this case would be invalid if subject to the basic principle that the Fourth Amendment ordinarily requires some form of individualized suspicion to intrude so profoundly upon individual privacy and dignity. *See* Part II-A, *supra*. They instead contend that this case is controlled not by ordinary Fourth Amendment principles but by this Court's holding that, in certain circumstances, a suspicionless strip search of a jail inmate may nonetheless be reasonable. That argument lacks merit.

1. In *Bell v. Wolfish*, 441 U.S. 520 (1979), jail officials required that detainees who engaged in contact visits – *i.e.*, direct contact with someone from outside the facility with whom they had arranged to meet in person – without direct oversight by prison officials subsequently be subject to a strip search and visual inspection of their body cavities to determine whether they had received contraband during the visit. In upholding that policy, this Court did not broadly rule that the Fourth Amendment permits strip-searching all inmates whatever the circumstances. Nor did the Court hold that jail strip

searches were a unique context in which courts should abandon their reliance on evidence and common sense in determining whether searches are reasonable. Instead, it held that the Constitution "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. The Court held that "under the circumstances" presented, the searches in question were reasonable. *Id.* at 558.

This Court specifically accepted the jail officials' sensible determination that there was a realistic prospect that an inmate and a visitor would use a contact visit that occurred without direct supervision to smuggle illicit materials into the facility. According to the government, such visits "present a *unique* opportunity" for smuggling contraband into jails. Pet. Br. 72, No. 77-1829, *Bell v. Wolfish*, 1978 WL 207132 (emphasis added). The Court accepted the jail officials' determination that their search policy was "necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution." 441 U.S. at 558.

2. This Court's decision upholding the strip searches in *Bell* is inapplicable to the suspicionless strip searches in this case on two grounds. *First*, *Bell* expressly rests on a concern with "inmate attempts to secrete [contraband] into the facility," 441 U.S. at 559 – in that case, the prospect that such loosely supervised contact visits logically could be coordinated by the inmate and the visitor to smuggle material into the jail. That concern is absent here.

The Third Circuit's contrary assertion – that "it is equally reasonable to assume that a detainee will arrange for an accomplice on the outside to subject

himself to arrest for a non-indictable offense to smuggle contraband into the facility," App. 24a – is not realistic. "As a matter of common sense, contact visits are far more likely to lead to smuggling than initial arrests." *Bull*, 595 F.3d at 998 (Thomas, J., dissenting). That is because "arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something. For the exceptions – for example, a person who is allowed to visit the bathroom unescorted before an arrest – reasonable suspicion may well exist." *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001).

As the dissenting judge below correctly recognized, it is implausible that with any regularity "individuals would deliberately commit minor offenses such as civil contempt – the offense for which Florence was arrested – and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries." App. 31a n.1. Further, the logic of the majority below requires such a hypothetical conspiratorial arrestee to imagine that he could coordinate the specific jail to which he would be admitted and the particular inmates with whom he would then come into contact. Then, he would have to conclude not only that the contraband he was carrying would evade the jail's extensive ordinary searches – visual inspections of admittees in their undergarments, pat downs, and metal detectors – but also that nothing about the circumstances of his arrest would justify the jail's taking the more intrusive step of conducting a full strip search.

The majority below disagreed, reasoning that the Fourth Amendment was satisfied here because it was

assertedly "*plausible*" that individuals hypothetically might "subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." App. 23a (emphasis added). Applying that exceptionally forgiving standard, the Third Circuit upheld the searches in this case despite the admitted inability of respondents to produce "any" actual proof that they materially assisted in deterring or detecting unlawful activity. *Id.* 25a.

That reasoning ignores the record in this case and conflicts with this Court's precedents. As the dissent below explained, "what might in some imagined circumstances be 'plausible' is without support in the record." App. 31a n.1 (Pollak, D.J., dissenting). Further, even in the prison context, a court must determine whether officials "show[] more than simply a logical relation, that is, whether [they] show[] a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion). The Constitution "requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Id.* at 535. "[R]estrictive prison regulations are permissible if they are 'reasonably related to legitimate penological interests,' and are not an 'exaggerated response' to such objectives." *Id.* at 528 (quoting *Turner*, 482 U.S. at 87) (internal citation omitted).

It thus is not enough that respondents can generically point to a problem with smuggling in jails. Although this Court has shown jail officials considerable deference, it nonetheless has consistently insisted on a demonstration of the direct relationship between the goals of a policy that directly implicates protected constitutional rights and

the particular inmate population to which those policies apply. In *Washington v. Harper*, 494 U.S. 210 (1990), the Court emphasized the "exclusive application" of the policy at issue "to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others." *Id.* at 226. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court took care to note that a policy limiting visits for certain inmates was limited to "[i]nmates who are classified as the highest security risks." *Id.* at 130. And most recently, in *Beard v. Banks*, 548 U.S. 521 (2006), it was significant that the policy was limited "to a group of specially dangerous and recalcitrant inmates," amounting to "about 0.01 percent of the total prison population." *Id.* at 525, 530 (plurality opinion).

Second, *Bell* is properly distinguished from this case on the ground that the detainees in *Bell* voluntarily submitted to the intrusion of a strip search by electing to engage in a loosely supervised contact visit in full knowledge of the jail's strip-search policy. The inmates in *Bell* could have avoided the strip searches but elected to give up some measure of privacy "to receive visitors and enjoy physical contact with them." *Shain*, 273 F.3d at 64 (citation and internal quotation marks omitted). Indeed, this Court has always placed significant weight on whether there are "'alternative means of exercising the right' available to inmates." *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (quoting *Turner*, 482 U.S. at 90). *E.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (in sustaining a restriction on visitation rights, the Court emphasized that inmates

had "alternative means of associating with those prohibited from visiting"). By contrast, individuals such as Florence who are involuntarily arrested and then strip-searched are entirely powerless to avoid this dramatic intrusion on their privacy.

3. Because there is no significant logical basis for respondents' practice of strip-searching individuals arrested for minor offenses in circumstances that do not otherwise create any suspicion, respondents bear the burden to come forward with evidence demonstrating that such a policy is necessary to detect or deter criminality. If smuggling in the distinct circumstances of arrests of non-indictable arrestees were in fact a realistic problem, respondents with all their experience in running jails surely could come forward with *some* evidence of that fact. And respondents had every opportunity in the district court to build such a record. But both the district court and the majority below recognized that respondents were not able to provide any empirical evidence to support their speculation that arrests might be coordinated as an effort to smuggle materials into a jail. App. 24a-25a, 87a.

Even if respondents themselves were unexpectedly constrained in their ability to come forward with any evidence, certainly there would be some relevant experience in facilities around the nation demonstrating that individuals have arranged arrests on non-indictable offenses. For decades in the wake of *Bell*, the uniform view of the federal courts of appeals was that the Fourth Amendment forbids suspicionless strip searches of non-indictable arrestees, *see, e.g.*, *Tintetti v. Wittke*, 479 F. Supp.

486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); that remains the rule in the great majority of the country.

But so far as the federal courts have been able to determine, there is not "a single document[ed] example of anyone [concealing contraband during arrest for a minor offense] with the intent of smuggling contraband into the jail." *Id.* 30a (Pollak, D.J., dissenting) (quoting *Bull*, 595 F.3d at 990 (Thomas, J., dissenting)). A report by the U.S. Department of Justice similarly concludes that the actual experience in jails does not justify policies requiring such sweeping searches. Instead, it identifies a distinct tendency "to exaggerate a possible security threat." William C. Collins, National Institute of Corrections, U.S. Department of Justice, *Jails and the Constitution: An Overview* 28 (2d ed. 2007), *available at* nicic.org/Downloads/PDF/Library/022570.pdf. In the wake of court rulings holding that jails may not adopt a categorical policy of strip-searching all non-indictable arrestees, jail officials "passionately believed that [the rulings] would result in major security problems because of dramatic increases in contraband entering the jail. However, these problems did not develop." *Id.* at 28-29.

Whatever thin justification respondents' bald assertions might provide for the searches of petitioner in this case evaporates entirely in the light of New Jersey law. The state legislature has adopted a comprehensive regime governing safety and security at correctional facilities, including with respect to the searches of arrestees. *See* N.J. Stat.

§ 2A:161A (App. 101a); N.J. Admin. Code § 10A:31-8.1-8.7 (App. 105a). Respondents offer no reason to doubt the legislature's competence to make such judgments. Yet state law explicitly provides that individuals arrested for a non-criminal offense "shall not be subjected to a strip search" in the absence of a warrant, consent, probable cause, or reasonable suspicion that the individual possesses a weapon or drugs. N.J. Stat. § 2A:161A-1 (App. 101a); *see also* N.J. Admin. Code § 10A:31-8.4 (App. 105a).

4. Even if this Court were to decline to accept the judgment of the State of New Jersey that it is unnecessary to strip-search individuals arrested for non-criminal offenses, the decision below could not be sustained on the basis of deferring to the judgment of respondents as jail officials. Respondents offer no reason to believe that circumstances in the Burlington or Essex facilities specially require suspicionless strip searches. Even more important, the jails' own formal policies forbid such a categorical approach. *See supra* at 5 (Burlington), 6-7 (Essex). Respondents cannot seriously maintain that such a suspicionless strip search is in fact necessary to maintain the security of the facility when both state law and the jails themselves nominally forbid it.

Furthermore, the United States Bureau of Prisons ("BOP") has determined that blanket strip searches are unnecessary to ensure security in its correctional facilities. Even in those jurisdictions in which such searches are permitted by the Fourth Amendment, the BOP still requires reasonable suspicion before conducting a strip search of those charged with minor offenses: "Detainees charged with misdemeanors, committed for civil contempt

(without also serving a concurrent criminal sentence) or held as material witnesses may *not* be [strip] searched visually unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." Civil Contempt of Court Commitments, Program Statement 5140.38, § 11 (2004) (emphasis added), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc. *Cf. Johnson v. California*, 543 U.S. 499, 508 (2005) (relying on the manner in which "[v]irtually all other States and the Federal Government manage their prison systems"); *McKune v. Lile*, 536 U.S. 24, 35 (2002) (Kennedy, J.) (relying on experience of the "Federal Bureau of Prisons and other States").

Finally, the Fourth Amendment reasonableness of respondents' strip searches of petitioner cannot be divorced from their antecedent decision to arrest petitioner for a non-criminal offense in the first place – indeed, to arrest him for an offense he did not actually commit. Respondents' concern that an individual in petitioner's position might hypothetically introduce contraband into the facility is an imagined dilemma entirely of their own making. The government in this case constructed a system under which it failed to determine correctly whether an individual was actually guilty of any offense, then arrested him for the utterly trivial failure to pay a fine, and then added the dramatic further intrusion of requiring him to strip naked in front of complete strangers, bend over, and cough. It simply is unreasonable to subject ordinary Americans to such extraordinary indignities.

III. This Case Presents The Ideal Vehicle In Which To Resolve This Important Question.

Certiorari should be granted in this case for the further reason that the suspicionless search of petitioner on the basis of his arrest for a non-indictable offense typifies the recurring factual circumstances of the cases that have given rise to the split in the courts of appeals. The underlying facts, including the scope and application of the jails' policies and practices, were the subject of extensive discovery in the district court, which wrote a thorough opinion. The court of appeals, in turn, considered and decided only this single question. The fact that the case involves two different jails, which apply different policies and conducted somewhat different searches in distinct circumstances, makes the case particularly well-suited as an opportunity to thoroughly explore the Fourth Amendment's application to searches of non-indictable arrestees.

Respondents moreover do not attempt to conjure up even a wildly hypothetical scenario in which Florence could have been attempting to smuggle materials into their facilities in his underwear or in his anus. Respondents would have to imagine petitioner as Houdini in reverse – full of almost magical slights and misdirection, all intended to get himself locked up – as he concocted an arrest warrant for a trivial offense (yet paid the fine to cover his tracks) and drove around with drugs taped underneath his testicles, ordering his pregnant wife to speed (with their four-year-old son in the back seat for cover), hoping to be arrested (while nonetheless protesting his innocence and showing the officer the official state paperwork to that effect) and hoping to

be taken to the Burlington and Essex County jails (despite the fact that New Jersey law required his prompt presentation to a magistrate and release) where he would meet up with fellow co-conspirators. That course of events is as absurd to articulate as it is offensive to believe. Yet it is inescapably the logic underlying the "reasonableness" of the searches in this case.

The conclusion that there was no justification for a strip search is even more obvious with respect to the Essex County facility. Upon Florence's transfer from Burlington County, he had *already* been strip-searched. Respondents knew that Florence was not carrying contraband because they already had stripped him naked and then kept him in a tightly controlled environment, with very limited contact with other inmates. Essex County's further strip search of petitioner served only to subject him to additional humiliation. *Cf. N.G. v. Conn.*, 382 F.3d 225, 233-34 (2d Cir. 2004) ("Whatever the justification for strip searches upon initial admission to a first detention facility, we see no state interest sufficient to warrant repeated strip searches simply because of transfers to other facilities."); *id.* at 238 (Sotomayor, J., concurring) ("Absent an individualized basis to believe that the plaintiffs had acquired contraband while in custody of the authorities, these re-entry searches violated Fourth Amendment standards of reasonableness.").

Additionally, the facts of this case place the privacy interest threatened by strip searches in stark relief. Not only are strip searches performed on individuals who are lawfully committed to jail; they are also applied to upstanding citizens who have done

nothing to deserve admission to jail in the first place, much less a humiliating strip search once they are detained. Florence is a hardworking financial director who clocks twelve-hour days. Florence Dep. 18. He is a middle-class family man, who, at the time of the arrest, was building a three-quarter million dollar home. *Id.* at 134. He is "put . . . on a higher pedestal" by his extended family, because he manages to hold a steady white-collar job. *Id.* at 147.

Florence's sworn deposition testimony confirms the dehumanizing intrusion of the searches in this case. At the time of the Burlington search, Florence had "never been . . . seen naked in front of a man," which made him "freak[] out" even more about the searches. *Id.* at 70. Because the officer had "look[ed] at [him] with no clothes on, naked, [Florence] just wanted to get away from him as quickly as [he] could." *Id.* at 73.

At the Essex County facility, Florence recalled, the search was particularly "painful" because he was "visualizing being stripped naked at Burlington and now being stripped naked at Essex." *Id.* at 129. "[A]ll you see is yourself being . . . looked at and . . . people eyeballing you, and I felt people were staring at me because they saw me naked." *Id.* at 117. Florence explained that being among a group of naked men made him "very uncomfortable" because if you look "to your left and one guy is kind of staring," and you look "to your right, and the other guy is staring." *Id.* at 130. Florence was "freaked" because he feared an officer would remark "he has a big penis or [a] small penis," all of which "was very uncomfortable." *Id.* at 117-18.

Florence has thus far resisted his family's suggestion that he see a psychiatrist or doctor to address the aftermath of these events. When he sees a State Trooper pull over a person, he experiences "anxiety" that the "person is going to go [through] the same treatment that I went through, the same strip search [and] the same men looking at you or belittling you . . . . You wonder about that and that's something that will always stick with me." *Id.* at 148. Florence's embarrassment was compounded because he felt dehumanized while in jail. He observed that the officers at both facilities "really don't care" about the inmates; "[i]t's a game to them." *Id.* at 130. To this day, when seeing a police officer, Florence's son asks, "Daddy, are you going to jail?" *Id.* at 175.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 19, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 09-3603 & 09-3661

ALBERT W. FLORENCE,

Appellee,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Appellants.

September 21, 2010

OPINION

HARDIMAN, Circuit Judge.

This interlocutory appeal requires us to decide whether it is constitutional for jails to strip search arrestees upon their admission to the general population. Although the question is one of first impression for this Court, the Supreme Court's

decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), and the many cases that followed it inform our analysis.

In *Bell*, the Supreme Court rejected a Fourth Amendment challenge to a policy of visual body cavity searches for all detainees—regardless of the reason for their incarceration—after contact visits with outsiders. *Id.* at 560. The Court applied a balancing test and concluded that the visual body cavity searches were reasonable because the prison's security interest justified the intrusion into the detainees' privacy.

Since *Bell* was decided, ten circuit courts of appeals applied its balancing test and uniformly concluded that an arrestee charged with minor offenses may not be strip searched consistent with the Fourth Amendment unless the prison has reasonable suspicion that the arrestee is concealing a weapon or other contraband. Things changed in 2008, however, when the en banc Court of Appeals for the Eleventh Circuit reversed its prior precedent and held that a jail's blanket policy of strip searching all arrestees upon entering the facility was reasonable even in the absence of individualized suspicion. *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc). A year later, the en banc Court of Appeals for the Ninth Circuit also reversed its prior precedent and upheld a blanket policy of strip searching all arrestees before they enter San Francisco's general jail population. *Bull v. City and County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc).

Confronted with a clear dichotomy between the en banc decisions of the Ninth and Eleventh Circuits on the one hand and the numerous cases that preceded them on the other, we must determine which line of

cases is more faithful to the Supreme Court's decision in *Bell*.

I.

A.

We begin with the facts surrounding the arrest and detention of lead Plaintiff Albert Florence. On March 3, 2005, a New Jersey state trooper stopped the car in which Florence was a passenger and arrested him based on an April 25, 2003 bench warrant from Essex County. The warrant charged Florence with a non-indictable variety of civil contempt. Though Florence protested the validity of the warrant by insisting he had already paid the fine on which it was based, he was arrested and taken to the Burlington County Jail (BCJ).

According to Florence, he was subjected to a strip and visual body-cavity search by corrections officers at BCJ. During the jail's intake process, Florence was directed to remove all of his clothing, then open his mouth and lift his tongue, hold out his arms and turn around, and lift his genitals. The officer conducting the search sat approximately arms-length in front of him, and directed Florence to shower once the search was complete. Florence was held at BCJ for six days.

During Florence's sixth day at BCJ, the Essex County Sheriff's Department took custody of him and transported him to the Essex County Correctional Facility (ECCF). Florence alleges that he was subjected to another strip and visual body-cavity search upon his arrival at ECCF. As described by Florence, he and four other detainees were instructed to enter separate shower stalls, strip naked and

shower under the watchful eyes of two corrections officers. After showering, Florence was directed to open his mouth and lift his genitals. Next, he was ordered to turn around so he faced away from the officers and to squat and cough. After donning ECCF-issued clothing and visiting a nurse, Florence joined the general jail population until the following day, when the charges against him were dismissed.

After his release, Florence sued BCJ, ECCF, and various individuals and municipal entities (collectively, the Jails) under 42 U.S.C. § 1983. While Florence asserted numerous constitutional claims, the only claim germane to this appeal is his Fourth Amendment challenge to the strip search procedures at BCJ and ECCF.

B.

On March 20, 2008, the District Court granted Florence's motion for class certification, defining the plaintiff class as:

> All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons[.]

Florence v. Bd. of Chosen Freeholders of the County of Burlington, 2008 WL 800970, at *17 (D.N.J. Mar. 20, 2008).[1]

Following discovery, the parties filed cross motions for summary judgment. In reviewing the motions, the District Court first considered whether the intake procedures at each facility rose to the level of a "strip search." *Florence v. Bd. of Chosen Freeholders of the County of Burlington*, 595 F. Supp. 2d 492, 502 (D.N.J. 2009). To resolve this question, the District Court reviewed the Jails' written search policies[2] as well as

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[1] Florence sought class certification only on his strip search claims; he did not seek certification on his claim that he was subjected to a visual body cavity search. *Florence v. Bd. of Chosen Freeholders of the County of Burlington*, 2008 WL 800970, at *8 n.5 (D.N.J. Mar. 20, 2008).

[2] BCJ's written policy defined a strip search as "[a] physical search of an inmate by the same sex officer while unclothed consisting of routine and systematic visual observation of the inmate's physical body to look for distinguished identifying marks, scars or deformities, signs of illness, injury or disease and/or the concealment of contraband on the inmate's body." *Burlington County Detention Center/Corrections & Work Release Center Policies and Procedures: Search of Inmates - No. Section 1186*, Supp. App. at 42.

The policy in effect at ECCF from September 2002 through April 2005 provided that all arrestees were to be strip searched and required to shower. *Department of Public Safety General Order No. 89-17*, Supp. App. 34. A "strip search" under the written policy is to consist of an officer "observ[ing] carefully while the inmate undresses" and examining the arrestee's ears, nose, hair and scalp, the interior of the mouth, fingers, hands, arms and armpits, and all body openings and the inner thighs. Id. The superceding ECCF policy, *Department of Corrections Administrative Directive No. 04-06*, requires that officers "conduct a thorough search of individual inmates," direct arrestees to shower during intake, and "observe and document, in

the deposition testimony of correctional officers and the wardens at each facility. Ultimately, the District Court concluded that, while there were facts in dispute—such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search—these disputes were immaterial because even the undisputed procedures of instructing arrestees to remove all of their clothing and subject their naked bodies to visual inspection "rose to the level of a strip search" under the Fourth Amendment. *Id.* at 502-03 ("Whatever the case may be, a discrepancy of this sort does not necessarily provide a genuine issue of material fact. . . . 'It's just common sense. Take off all your clothes. You're strip[] searched.'" (quoting Plaintiffs' counsel)).

The District Court found that BCJ's "blanket" strip search policy "entails a complete disrobing, followed by an examination of the nude inmate for bruises, marks, wounds or other distinguishing features by the supervising officer, which is then followed by a supervised shower with a delousing agent." *Id.* at 502. The Court found that ECCF utilized similar strip-search and supervised-shower procedures; however, the ECCF procedures were slightly more intrusive because "Essex officers carefully observed the entire naked body of the inmate, including body openings and inner thighs." *Id.* at 503.[3] Having thus defined the

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writing, any evidence of: a) notable body markings such as 'tattoos;' b) [b]ody vermin or disease; [and] c) [o]pen sores, visible wounds, scars, [or] injuries" on the arrestees' bodies. Supp. App. at 40.

[3] The Jails do not challenge the District Court's factual findings regarding the scope of the strip search policies. Rather, they assert that such searches are permissible under *Bell*.

Jails' respective search policies, the District Court concluded that the procedures failed the Bell balancing test and observed that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional." *Id.* at 513. Based on this holding, the District Court granted the Plaintiffs' motion for summary judgment on the unlawful search claim, but denied the Plaintiffs' request for a preliminary injunction. *Id.* at 519. The Court denied Defendants' cross-motion which sought qualified and Eleventh Amendment immunity. *Id.*

Following the decision, the Jails moved the District Court to certify its summary judgment as an appealable order pursuant to 28 U.S.C. § 1292(b). The District Court agreed that the order "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion," *id.*, and we granted permission to appeal. The District Court certified the following question for our review: "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment." *Florence v. Bd of Chosen Freeholders of the County of Burlington*, 657 F. Supp. 2d 504, 511 (D.N.J. 2009) (order certifying issue for appeal). "In reviewing an interlocutory appeal under 28 U.S.C. § 1292(b), this court exercises plenary review over the question certified." *Morris v. Rumsfeld*, 420 F.3d 287, 290 (3d Cir. 2005).

II.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. To enforce this guarantee, government officials are limited to only those searches which are reasonable. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). Reasonableness under the Fourth Amendment is a flexible standard, *Bodine v. Warwick*, 72 F.3d 393, 398 (3d Cir. 1995), "not capable of precise definition or mechanical application," *Bell*, 441 U.S. at 559. "In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.*

Detention in a correctional facility "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security." *Id.* (internal quotation marks and citations omitted). Because privacy is greatly curtailed by the nature of the prison environment, a detainee's Fourth Amendment rights are likewise diminished. *See id.* at 526 (holding that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell"); *Bell*, 441 U.S. at 537 ("Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility.").

While the Supreme Court has "repeatedly held that prisons are not beyond the reach of the Constitution[,]" *Hudson*, 468 U.S. at 523, it has also

emphasized that the judiciary has a "very limited role" in the administration of detention facilities, *Block v. Rutherford*, 468 U.S. 576, 584 (1984). Indeed, detention facilities have been described as "unique place[s] fraught with serious security dangers," *Bell*, 441 U.S. at 559, the management of which "courts are ill equipped to deal with," *id.* at 548 n.30. Therefore, authorities are entitled to considerable latitude in designing and implementing prison management policies. *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). As the Supreme Court cautioned in Bell: "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U.S. at 547. In addition to prison administrators' "professional expertise," separation of powers and federalism concerns support "wide-ranging deference" to the decisions of prison authorities. *Id.* at 548 ("[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive branches of our Government, not the Judicial."); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("[S]eparation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.").

A.

Having explained the general standards that govern our inquiry, we turn to the Supreme Court's pathmarking decision in *Bell v. Wolfish*. Although there are factual differences between *Bell* and the instant case, they are sufficiently similar to warrant a detailed review of *Bell*.

In *Bell*, pretrial detainees and convicted prisoners confined at the Metropolitan Correctional Center (MCC)—a federally operated short-term custodial facility—filed suit challenging numerous prison practices and conditions of confinement. 441 U.S. at 523-24. Although the primary purpose of MCC was to house pretrial detainees awaiting trial on federal criminal charges, the facility also housed: witnesses in protective custody, contemnors, inmates awaiting sentencing or transportation to federal prison, inmates serving relatively short sentences, and inmates lodged under writs of habeas corpus issued to ensure their presence at trial. *Id.* at 524. The population at MCC was quite transient, with 50% of its inmates spending fewer than 30 days at the facility and 73% of the population spending fewer than 60 days at MCC. *Id.* at 524 n.3.

Among the conditions of confinement challenged by the inmates at MCC was the policy of strip and visual body-cavity searches after contact visits with outsiders. Under that policy, all persons housed at MCC—regardless of the reason for their detention—were "required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Id.* at 558. For males, this required

"lift[ing] [the] genitals and bend[ing] over to spread [the] buttocks for visual inspection." *Id.* at 558 n.39. "The vaginal and anal cavities of female inmates also [were] visually inspected." *Id.* Inmates were not touched by officers during the searches. *Id.*

The district court in Bell upheld the strip searches but held the visual body cavity searches unreasonable under the Fourth Amendment. *Id.* at 558. The Court of Appeals for the Second Circuit affirmed, finding that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." *Id.* (internal quotation marks omitted).

The Supreme Court reversed, holding that the visual body-cavity searches were reasonable under the Fourth Amendment. *Id.* As a preliminary matter, the Court assumed without deciding that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights upon commitment to a correctional facility. *Id.* It then explained that, in each case, the test of Fourth Amendment reasonableness requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails," and instructed courts to consider four factors in assessing reasonableness: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559.

In applying the balancing test to the search policy, the Supreme Court cited MCC's dual objectives of detecting and deterring smuggling of weapons and other contraband, recognizing that "[s]muggling of

money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* The Court upheld the policy despite the absence of any evidence of smuggling problems at MCC as the record contained only one instance where an inmate was caught with contraband in a body cavity. *Id.* Nevertheless, the Court found the lack of evidence supported the prison's interest in the policy because it was "more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of inmates to secrete and import such items when the opportunity arises." *Id.*

Significantly, *Bell* included just one sentence discussing the scope of the privacy intrusion, in which the Court stated that it "d[id] not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. And though it acknowledged that correctional officers may sometimes conduct the searches in an impermissibly abusive fashion, the Supreme Court did not address that issue; rather, it limited its review to the policy as a whole, "deal[ing] . . . with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause grounds." *Id.* The Court answered that question in the affirmative. Moreover, the Court rejected the district court's consideration of alternative, less-intrusive means of detecting contraband. Even assuming the availability of such alternatives, the Court deferred to MCC's choice of security procedure because it had not been shown to be "irrational or unreasonable." *Id.* at 559 n.40.

B.

In the years following *Bell*, ten circuit courts of appeals applied the Supreme Court's balancing test to strip searches of individuals arrested for minor offenses and found the searches unconstitutional where not supported by reasonable suspicion that the arrestee was hiding a weapon or contraband.[4] In

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[4] *See Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001) (blanket policy of strip searches upon intake to jail unreasonable when applied to DUI arrestee absent reasonable suspicion); *Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001) (blanket policy of strip searching arrestees was unreasonable as applied to those arrested for minor offenses); *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996) ("Jail officials may strip search a person arrested for a minor offense and detained pending the posting of bond only if they possess a reasonable suspicion that he is hiding weapons or contraband."); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.) ("[A]uthorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail."), *cert. denied*, 493 U.S. 977 (1989); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) ("[T]he Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with . . . minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband."), *cert. denied*, 483 U.S. 1020 (1987); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (strip search of misdemeanor detainee arrested for violation of leash law where police had no reason to suspect arrestee would secrete weapon or contraband into holding cell was unreasonable under *Bell*); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984) ("[A]rrestees for minor offenses may be subjected to a strip search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering from a communicable disease."), *cert. denied*, 471 U.S. 1053 (1985); *Hill v. Rogers*, 735 F.2d 391, 394 (10th Cir. 1984) (unreasonable to

general, these courts concluded that the extreme invasion of privacy caused by a strip and/or visual body-cavity search outweighed the prison's minimal interest in searching an individual charged with a minor crime shortly after arrest. *See, e.g.*, *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983). The critical factor in balancing the competing interests was the belief that individuals arrested for minor offenses presented a relatively slight security risk because they usually are arrested unexpectedly whereas the contact visits in *Bell* may have been arranged specifically for the purpose of smuggling weapons or drugs. *See, e.g.*, *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) ("It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something."); *Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001) ("[T]he deterrent rationale for

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strip search individual arrested for traffic violation on way to work at 7:30 a.m. because there was no reasonable suspicion that he was concealing contraband even though arrestee was briefly intermingled with the general jail population); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (strip search of female arrestees charged with minor offenses were unreasonable "without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed"); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) ("An indiscriminate strip search policy routinely applied to detainees . . . cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations."), *cert. denied*, 455 U.S. 942 (1982).

the Bell search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration.").

Recently, the Eleventh and Ninth Circuits, sitting en banc, reversed their prior precedents and held that *Bell* authorizes a policy of blanket strip searches for all arrestees entering the general population of a jail. *See Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) (overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)); *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) (overruling *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)).

In *Powell*, the Eleventh Circuit reviewed a policy of strip searching all arrestees at the time of intake implemented by the Fulton County Jail in Georgia. The policy required that all persons entering the jail's general population be strip searched regardless of the crime charged and without any individualized suspicion. *Powell*, 541 F.3d at 1301. The booking process required groups of 30 to 40 arrestees to enter a large shower room, simultaneously remove all of their clothing, place it in boxes and then shower. *Id.* "After the group shower each arrestee either singly, or standing in a line with others, is visually inspected front and back by deputies. Then each man takes his clothes to a counter and exchanges his own clothes for a jail jumpsuit." *Id.* (internal quotation marks, brackets, and citations omitted). The Eleventh Circuit discussed in great detail the facts and circumstances surrounding the searches at issue in *Bell*, which demonstrated the high level of intrusiveness that the Supreme Court countenanced as reasonable. The Eleventh Circuit also noted the paltry record of body-

cavity smuggling at MCC as evidence of the significant deference provided to prison administrators by the Court in *Bell*. In light of these points, the Eleventh Circuit determined that most courts (and its own prior precedent) misinterpreted *Bell* to require reasonable suspicion for strip searches of minor offenders. *Id.* at 1307. It opined that the decisions requiring reasonable suspicion failed to give appropriate deference to the judgments of prison administrators and ignored the fact that in upholding visual body-cavity searches, the Supreme Court in *Bell* neither required individualized suspicion of smuggling nor differentiated the degree of suspicion required based on the type of offender. *Id.* at 1307-11.

The *Powell* court also disagreed with the majority view that security interests at the time of intake are less important than those arising after an inmate's contact visit with an outsider, describing "an inmate's initial entry into a detention facility" as "coming after one big and prolonged contact visit with the outside world." *Id.* at 1313. The court asserted that the "need for strip searches at all detention facilities, including county jails, is not exaggerated." *Id.* at 1310. Citing other cases, the court noted the problem of gang violence in prisons and observed that gang members might "coerce, cajole, or intimidate lesser violators into smuggling contraband into the facility." *Id.* at 1311 (citation omitted). In light of these security concerns, the Eleventh Circuit held that "a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible" at least where the search

is no more intrusive than the search in *Bell*. *Id.* at 1300.

Like the Eleventh Circuit in *Powell*, the Ninth Circuit in *Bull v. City and County of San Francisco* reversed prior precedent and upheld the San Francisco Sheriff's policy authorizing strip searches of all arrestees before they are placed in the general population of a county jail. *Bull*, 595 F.3d at 966. In rejecting its prior requirement of reasonable suspicion for arrestee strip searches, the *Bull* court relied on much of the same reasoning as the Eleventh Circuit in *Powell*, including its view that decisions interpreting *Bell v. Wolfish* to require reasonable suspicion to strip search minor offenders were analytically flawed. *Id.* at 977-78. The Ninth Circuit concluded that "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*." *Id.* at 975. Based on the record presented, the justification for searching arrestees at the time of intake was even higher than the justification for the post-contact visit searches in *Bell* because San Francisco had amassed a record demonstrating "a pervasive and serious problem with contraband inside San Francisco's jails" as well as instances of contraband smuggled within body cavities. *Id.*

C.

Mindful of the newly-minted circuit split we have described, we proceed to apply *Bell*'s balancing test to the question certified for interlocutory appeal in this

case.[5] The Jails rely heavily on *Powell* in support of their argument that strip searches satisfy the reasonableness standard of *Bell*. They argue that the searches serve the valid prison interests of "eliminating weapons and drugs from the jail environment, serving to mitigate gang violence and preventing disease," and that these concerns apply to indictable and non-indictable arrestees alike. On behalf of the Plaintiff class, Florence counters that the District Court properly applied *Bell*, and that we should adopt the reasonable suspicion requirement applied by the majority of our sister circuits. Florence also challenges the legitimacy of the gang, health, and contraband concerns as justifications for the strip search of non-indictable arrestees as unsupported by

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[5] In *Bull*, the Ninth Circuit held the constitutionality of a prison strip search was governed by *Turner v. Safley*, 482 U.S. 78 (1987), in addition to *Bell v. Wolfish*. *Bull*, 595 F.3d at 973-74. Neither the Supreme Court nor this Court has applied the rational-relationship test of *Turner* to a Fourth Amendment challenge to prison policies. While it is arguable that some Fourth Amendment rights are "inconsistent with proper incarceration" and therefore covered by *Turner*, *see Johnson v. California*, 543 U.S. 499, 510 (2005) (internal quotation marks omitted), absent an express statement from the Supreme Court that *Turner* supplanted *Bell*, we find its framework for the analysis of detainee constitutional claims inapplicable here. *See Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). Moreover, the Jails do not seek application of *Turner* to Plaintiffs' Fourth Amendment claims. *See* Appellants' Reply Br. at 17 ("Some courts have ruled that the *Turner* case, with its easier standard, has overruled *Bell*. Appellants have not argued that *Turner*, and the rational basis test, should be the standard before the Court.").

the record and argues that there are less intrusive alternatives to satisfy the Jails' security interests.

Like the Supreme Court in *Bell*, we assume detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility.[6] *See Bell*, 441 U.S. at 558; *but see Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001) (noting that under *Hudson v. Palmer*, 468 U.S. 517 (1984), "prisoners do not have a Fourth Amendment right to privacy in their cells"). To determine whether the strip search procedures at BCJ and ECCF violate the Fourth Amendment, we first consider the scope of the searches at issue.

We have previously recognized that a strip search constitutes a "significant intrusion on an individual's privacy." *United States v. Whitted*, 541 F.3d 480, 486 (3d Cir. 2008). Here, the strip search policies require the arrestees to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower. We do not minimize the extreme intrusion on privacy associated with a strip search by law enforcement officers; however, the searches at issue here are less intrusive than the visual body-cavity searches considered by the Supreme Court in *Bell*. In fact, they are closer to the strip searches upheld by the lower court in *Bell*.

The searches were also conducted in a similar manner and place as those in *Bell*—by correctional officers at a detention facility. The policies governing strip searches at BCJ require that they be conducted

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[6] Other courts of appeals have gone further, holding that "the Fourth Amendment does apply to the invasion of bodily privacy in prisons." *See Bull*, 595 F.3d at 974-75.

"in private . . . under sanitary conditions . . . [and] in a professional and dignified manner." Moreover, the searches are relatively brief, such that between the search and supervised shower, an arrestee is not required to remain naked for more than several minutes. Because the scope, manner, and place of the searches are similar to or less intrusive than those in *Bell*, the only factor on which Plaintiffs could distinguish this case is the Jails' justification for the searches.

Detention facilities are "unique place[s] fraught with serious security dangers." *Bell*, 441 U.S. at 559. We have recognized that New Jersey jails, like most correctional facilities, face serious problems caused by the presence of gangs. See *Fraise v. Terhune*, 283 F.3d 506, 521-22 (3d Cir. 2002) (upholding New Jersey prison policy of identifying gang members and transferring core members to Security Threat Group Management Unit). The Jails cite three specific security interests to justify strip searches: (1) the detection and deterrence of smuggling weapons, drugs or other contraband into the facility, (2) the identification of gang members by observing their tattoos, and (3) the prevention of disease, specifically Methicillin-resistant Staphylococcus aureus (MRSA). Of these three, the potential for smuggling of weapons, drugs, and other contraband poses the greatest security threat.

It is self-evident that preventing the introduction of weapons and drugs into the prison environment is a legitimate interest of concern for prison administrators. *See Bell*, 441 U.S. at 540 ("[T]he Government must be able to take steps to maintain

security and order at the institution and make certain no weapons or illicit drugs reach detainees."); *see also Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) ("Drug smuggling and drug use in prison are intractable problems.") (citing *Bell*, *Block*, and *Hudson*); *Block*, 468 U.S. at 586 (upholding total ban on contact visits as reasonably related to prison interest in preventing security concerns including "open[ing] the institution to the introduction of drugs, weapons, and other contraband"). Prevention of the entry of illegal weapons and drugs is vital to the protection of inmates and prison personnel alike. *See Bell*, 441 U.S. at 547 ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . ."); *Bull*, 595 F.3d at 967 (citing instance in which inmate used razor-blades secreted in rectal cavity to attempt suicide); see also *E.E.O.C. v. The GEO Group, Inc.*, --- F.3d ---, 2010 WL 2991380, at *8 (3d Cir. Aug. 2, 2010) ("A prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances").

Like the Ninth and Eleventh Circuit Courts of Appeals, we conclude that the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*. We reject Plaintiffs' argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*. First, the *Bell* court explicitly rejected any distinction in security risk based on the reason for detention. *Bell*, 441 U.S. at 546 n.28 ("There is no basis for concluding that pretrial detainees pose any

lesser security risk than convicted inmates."). Instead, the security risk was defined by the fact of detention in a correctional facility.[7] *See also Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) ("[I]t is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security." (citation omitted)).

Second, *Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates at MCC.[8] *Bell*, 441 U.S. at 560 (bypassing concerns regarding abuses during particular searches to uphold policy as a whole, stating: "we deal here with the question whether

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[7] For similar reasons, we reject Plaintiffs' argument that the searches are unreasonable because non-indictable arrestees have greater Fourth Amendment rights than the pretrial detainees in *Bell*. We are not presented with an argument that it was improper for the Jails to detain members of the Plaintiff class in the first place; thus we address only the constitutionality of the policy as applied to people properly assigned to the Jails and entering the general population. The *Bell* analysis applies equally to all individuals so assigned—whether they be convicted inmates, indicted pretrial detainees, contemnors, material witnesses, or arrestees awaiting preliminary hearings before a magistrate.

[8] The absence of an individualized suspicion requirement in *Bell* is consistent with the Fourth Amendment doctrine of special needs searches. "[T]here are instances when a search furthers a 'special governmental need' beyond that of normal law enforcement such that the search, although not supported by the typical quantum of individualized suspicion, can nonetheless still be found constitutionally 'reasonable.'" *Neumeyer v. Beard*, 421 F.3d 210, 214 (3d Cir. 2005) (prison policy of randomly searching visitors' vehicles was reasonable because privacy intrusion was outweighed by prison's "special need to maintain the security and safety of the prison").

visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can."). MCC housed pretrial detainees, convicted inmates, and even non-offenders held as material witnesses, all of whom were included in the plaintiff class. *See Bell*, 441 U.S. at 524.

We also disagree with Plaintiffs' contention that the risk that non-indictable offenders will smuggle contraband is low because arrest for this category of offenses is often unanticipated. Even assuming that most such arrests are unanticipated, this is not always the case. It is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility. This would be especially true if we were to hold that those incarcerated on non-indictable offenses are, as a class, not subject to search. For that reason, we agree with the concern expressed by the Eleventh Circuit in Powell that gang members would be likely to exploit an exception from security procedures for minor offenders. 541 F.3d at 1311.

A similar risk was recognized by the Supreme Court in *Block v. Rutherford*, where the Court upheld a prison policy denying contact visits to pretrial detainees regardless of the crime charged. 468 U.S. 576, 589 (1984). In *Block*, the district court permitted the denial of contact visits for high risk detainees, but required the jail to provide visits for pretrial detainees "concerning whom there is no indication of drug or

escape propensities." *Id.* at 580 n.2. The Supreme Court rejected the lower court's characterization of a blanket ban on contact visits as disproportionate to the risks posed by low level detainees. In doing so, the Court reasoned that inmates would likely take advantage of any gap in security: "[i]t is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits." *Id.* at 587.

It is also important to note that the opportunity for smuggling during the contact visits in *Bell* was low. As described by the district court in that case, "inmates and their visitors are in full view during the visits and fully clad. The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility." *Wolfish v. Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977). Despite these obstacles to an inmate obtaining contraband from a visitor and hiding it in a body cavity, the Supreme Court still found that MCC's interest in detecting and deterring this low risk of smuggling outweighed the privacy intrusion. If it is reasonable to assume that a prisoner will try to arrange for a visitor to deliver contraband during a contact visit, it is equally reasonable to assume that a detainee will arrange for an accomplice on the outside to subject himself to arrest for a non-indictable offense to smuggle contraband into the facility. Thus, the Jails' interest in preventing smuggling at the time of intake is just as high as MCC's interest after the contact visits in *Bell*.

The Plaintiff class argues that the Jails cannot rely on an interest in preventing smuggling because

they have not presented any evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband. It is true that the Jails' justifications for strip searches would be stronger if supported by evidence regarding discovery of contraband on indictable and non-indictable offenders during intake, and the incidence with which gang members are arrested for non-indictable offenses. *See, e.g.*, *Bull*, 595 F.3d at 975. Nonetheless, our interpretation of the Supreme Court's decision in *Bell* leads us to conclude that the Jails are not required to produce such a record.

In *Bell*, the single instance of attempted smuggling did not undermine MCC's justification for the search. Quite to the contrary, the Court considered the absence of a record to be evidence of the policy's successful deterrent effect. *Bell*, 441 U.S. at 559. Likewise here, strip searches at the time of intake also have significant deterrent value. If non-indictable offenders were not subject to automatic search it would create a security gap which offenders could exploit with relative ease.

The *Bell* court did not require a record of smuggling to justify MCC's interest in preventing it (in fact, there was no time for a long history of smuggling to have developed as the *Bell* plaintiffs filed their case only four months after MCC opened). *Id.* at 526. The Supreme Court declared that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence" at detention facilities. *Id.* at 559. In addition to the sole instance of smuggling in the record, *Bell* relied upon cases concerning other detention facilities for the proposition that inmates

attempt to secrete items in their body cavities. *See id.* (citing *Ferraro v. United States*, 590 F.2d 335 (6th Cir. 1978), and *United States v. Park*, 521 F.2d 1381, 1382 (9th Cir. 1975)).

Finally, we also find significant that the Supreme Court repeatedly has emphasized that courts must defer to the policy judgments of prison administrators. *See, e.g., Bell*, 441 U.S. at 531 (repeating "admonition" from *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," and therefore "it would 'not be wise for [a court of appeals] to second-guess the expert administrators on matters on which they are better informed.'" (internal brackets omitted)); *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."). Moreover, we have stated that "deference is especially appropriate when a regulation implicates prison security." *Fraise*, 283 F.3d at 516; *see also Overton*, 539 U.S. at 133 (internal security is "perhaps the most legitimate of penological goals"). This emphasis on deference further supports the proposition that the absence of evidence of smuggling at a particular correctional institution does not demonstrate the unreasonableness of a policy implemented to prevent smuggling. A detention facility need not suffer a pattern of security breaches before it takes steps to prevent them where those steps are neither "irrational [n]or unreasonable." *See Bell*, 441 U.S. at 559 n.40; *E.E.O.C.*, --- F.3d at ---, 2010 WL 2991380, at *8.

Plaintiffs assert that the Jails' interest in preventing smuggling could be achieved through means less intrusive than strip searches. Specifically, Plaintiffs point to the Body Orifice Scanning System (BOSS Chair), "[a] non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities," a security method already used by ECCF. In *Bell*, the Supreme Court rejected the district court's reliance on the less-intrusive means of metal detection in evaluating searches at MCC. *Id.* The Court found metal detection to be less effective than the visual search procedure and deferred to the prison administrator's decision to use the visual search method. Florence's argument regarding the BOSS Chair fails for the same reasons. Aside from the fact that there is no evidence regarding the efficacy of the BOSS Chair in detecting metallic objects, it would not detect drugs and other non-metallic contraband. Accordingly, the decision not to rely exclusively on the BOSS Chair is not unreasonable.

As asserted by the Jails, a blanket policy will help to avoid potential equal protection concerns in the strip search process as it removes officer discretion in selecting which arrestees to search. The potential for abuse in a "reasonable suspicion" scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest. *See, e.g.*, *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008) (reasonable suspicion to strip search a misdemeanor arrestee may be "based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" (internal quotations and

citation omitted)); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (expressing preference for policy of drug-testing all student athletes as opposed to testing based on suspicion of drug use because suspicion-based testing "brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students"). Subjecting all arrestees to the same policy promotes equal treatment. *See Bull*, 595 F.3d at 983 (Kozinski, J., concurring) (observing that blanket searches of all individuals participating in the same activity "trade the protection afforded by individualized suspicion for the protection derived from the fact that the government treats all similarly situated people in precisely the same way").

In sum, balancing the Jails' security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates, we hold that the strip search procedures described by the District Court at BCJ and ECCF are reasonable. Accordingly, we will reverse the District Court's grant of summary judgment on Plaintiffs' Fourth Amendment strip search claim and remand for further proceedings consistent with this opinion.[9]

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[9] Having found that the Jails' valid interest in preventing smuggling justifies the strip searches, we need not determine whether the interests in identifying gang members and detecting MRSA infection are sufficient to justify the searches.

POLLAK, District Judge, dissenting.

I.

I respectfully disagree with the court's opinion. I think Judge Rodriguez's decision should be affirmed, and I would expressly predicate the order of affirmance on his comprehensive, finely crafted, and characteristically thoughtful opinion.

II.

In upholding as constitutional strip searches of persons detained on non-indictable offenses and with respect to whom there is no individualized ground for suspicion that they may be bringing contraband into a detention facility, the court finds the en banc opinions of the Eleventh Circuit, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008), and of the Ninth Circuit, *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010), persuasive. For my part, I find greater wisdom in Judge Barkett's dissent in *Powell* and Judge Thomas's dissent in *Bull*.

Judge Thomas's *Bull* dissent frames the issues this way:

> The majority sweeps away twenty-five years of jurisprudence, giving jailors the unfettered right to conduct mandatory, routine, suspicionless body cavity searches on any citizen who may be arrested for minor offenses, such as violating a leash law or a traffic code, and who pose no credible risk for smuggling contraband into the jail. Under its reconfigured regime, the majority discards *Bell*'s requirement of balance the need for a search against individual privacy and instead

> blesses a uniform policy of performing body cavity searches on everyone arrested and designated for the general jail population, regardless of the triviality of the charge or the likelihood that the arrestee is hiding contraband.
>
> The rationale for this abrupt precedential departure is founded on quicksand. Indeed, the government's entire argument is based on the logical fallacy *cum hoc ergo propter hoc*– happenstance implies causation. The government argues that contraband has been found in the San Francisco jails. Thus, the government reasons, individuals who are arrested must be smuggling contraband into the jail. Therefore the government concludes it must body cavity search everyone who is arrested, even those who pose no risk of concealing contraband, much less of trying to smuggle contraband into the jail.
>
> This reasoning finds no support from the record in this case. Although there is evidence of some arrestees attempting to conceal contraband during their arrest, there is not a single document example of anyone doing so with the intent of smuggling contraband into the jail. More importantly, for our purposes, there is not a single example of anyone from the class defined by the district court who was found to possess contraband upon being strip search. Not one.

Bull, 595 F.3d at 990.

In his District Court opinion, Judge Rodriguez makes a point which gives special cogency to Judge Thomas's "Not one":

> . . . [I]t is worth noting that neither county submits supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities.

Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492, 513 (D.N.J. 2009).[1]

Judge Barkett's *Powell* dissent sums up the issues with special force:

> Like the majority, I recognize and appreciate the deference due to jail administrators as they fulfill their charge of ensuring security in jails, not only for the jail officials but also for the inmates. *See Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). At the same time, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Id.* at 545. This principle applies with at least as much force to

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[1] The court says that "[i]t is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." One might doubt that individuals would deliberately commit minor offenses such as civil contempt—the offense for which Florence was arrested—and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries. Nonetheless, the point made by Judge Rodriguez establishes that what might in some imagined circumstances be "plausible" is without support in the record before Judge Rodriguez–the record binding on Judge Rodriguez and on this court.

> individuals detained prior to their trial on petty misdemeanor charges such as failing to pay child support, driving without a license, or trespassing. *See id.* These protections, such as the right to be free from degrading, humiliating, and dehumanizing treatment and the right to bodily integrity, include protection against forced nakedness during strip searches in front of others.

Powell, 541 F.3d at 1315.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-8038 & 09-8039

ALBERT W. FLORENCE

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.

August 4, 2009

Present: BARRY, AMBRO and SMITH, Circuit Judges

1. Petition by Essex County Correctional Facility and Essex County Sheriff's Department for Permission to Appeal the District Court's 02/04/09 Order granting Summary Judgment.

2. Petition by the Board of Chosen Freeholders of the County of Burlington and Warden Juel Cole for Permission to Appeal the District

Court's **02/04/09** Order granting Summary Judgment.

3. **Response by Respondent Albert W. Florence in Opposition to the Petitions for Permission to Appeal.**

/s/ Anthony Infante
Anthony Infante
Case Manager 267-299-4916

ORDER

The foregoing Petitions for Permission to Appeal are GRANTED.

By the Court,
/s/ D. Brooks Smith
Circuit Judge

Dated: August 26, 2009

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 05-cv-3619

ALBERT W. FLORENCE,

Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Defendants.

June 30, 2009

MEMORANDUM OPINION AND ORDER

RODRIGUEZ, Senior District Judge.

This matter comes before the Court on Motions by Defendants Board of Chosen Freeholders of the County of Burlington, Warden Jule Cole in his Official

and Individual Capacity, and Burlington County Jail ("Burlington Defendants") [Dkt. Entry No. 165] and Defendants Essex County Correctional Facility and Essex County Sheriff's Department("Essex Defendants") [Dkt. Entry No. 166] to amend the Court's Order of February 4, 2009 by certifying the judgment on the cross-motions for summary judgment as final, pursuant to 28 U.S.C. § 1292(b). Plaintiff Albert W. Florence, as representative of the class certified by this Court, opposes the motions to amend. For the foregoing reasons, the motions of Burlington and Essex Defendants are granted.

I.

Because the parties are intimately familiar with this case, an exhaustive recitation of the facts and procedural history is unnecessary. Only those facts that are necessary to the analysis of this matter are included herein.

This case originated in 2005 when Albert W. Florence filed a complaint against Burlington and Essex Defendants for alleged violations of his federal constitutional rights. (*See* Compl. *filed* July 19, 2005.) After a determination was made on Plaintiff's motion to amend, and discovery proceeded, this Court granted Plaintiff's motion for certification of his proposed class. See *Florence v. Board of Chosen Freeholders of the County of Burlington ("Florence I")*, No. 05-3619, 2008 WL 800970 at *1 (D.N.J. Mar. 20, 2008). That class was certified as follows:

> All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional

> Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term the procedure a 'visual observation' or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.

Florence I, supra, at *17.

Shortly thereafter, Plaintiff, as representative of the newly-certified class, filed for summary judgment on the issue of law regarding whether Defendants violated the Fourth Amendment by their blanket policy of strip searching non-indictable arrestees without reasonable suspicion upon entry into a county correctional facility. [Dkt. Entry No. 116.] Plaintiffs additionally sought injunctive relief against Burlington and Essex Defendants. Burlington and Essex Defendants filed their opposition papers and cross-moved for summary judgment.[1] [Dkt. Entry Nos.

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[1] Burlington Defendants moved for summary judgment on three grounds. First, Burlington sought summary judgment on the Fourth Amendment issue regarding strip searches of non-indictable arrestees. Because the Court found in favor of Plaintiffs' position on that issue, Burlington Defendants' motion was denied. *Florence II*, 595 F. Supp. 2d at 513. Second, Burlington moved for summary judgment in favor of Burlington County Freeholders and Warden Jule Cole in his official capacity on Eleventh Amendment immunity grounds. That motion was denied without prejudice, as the Court deemed it premature given the record before it. Id. at 516. Finally, Burlington moved for summary judgment in favor of Warden Jule Cole in his individual capacity on qualified immunity grounds. That motion was denied with prejudice. *Id.* at 518.

130 & 131.] On February 4, 2009, Plaintiffs' motion for summary judgment was granted and Defendants' cross-motions were denied. *See Florence v. Board of Chosen Freeholders of the County of Burlington ("Florence II")*, 595 F. Supp. 2d 492, 513 (D.N.J. 2009).

Defendants now file motions to amend/correct the Order of February 4, 2009. [Dkt. Entry Nos. 165, 166, 167]. Essentially, Burlington and Essex Defendants ask this Court to amend its Order to include a provision certifying the decision for appeal to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). (Burlington Def. Br. 3; Essex Def. Br. 2.) Plaintiffs oppose the instant motion. [Dkt. Entry Nos. 173, 180]. This Court has received three submissions styled as *amicus curiae* letter briefs in support of Defendants' motion to amend/correct, undoubtedly due to the ubiquity of similar cases in the District of New Jersey.[2] For the reasons expressed below, the motions of Burlington and Essex Defendants are granted.

II.

Federal Rule of Civil Procedure 59(e) permits the Court to amend or correct an order under 28 U.S.C. § 1292(b) so as to include certification for immediate appeal to the United States Circuit Court of Appeals

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As for Essex Defendants, they too sought summary judgment on the Fourth Amendment issue. Essex also sought dismissal of Plaintiff's § 1983 Municipality Custom Violations claim. Both prayers for relief were denied. *Id.* at 513, 519.

[2] Specifically, this Court received *amicus curiae* letters from Atlantic, Gloucester, and Ocean Counties asking this Court to grant Defendants' motions to amend/correct the Order of February 4, 2009.

for the Third Circuit.[3] *See, e.g.*, *In re Oxford Health Plans, Inc.*, 182 F.R.D. 51, 52 (S.D.N.Y. 1998); *In re City of Philadelphia Litig.*, 1994 WL 250075, at *1 (E.D. Pa. Jan. 31, 1994). Section 1292(b) of the United States Code, Title 28, provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). This statute requires that three elements be present prior to granting certification for interlocutory appeal: (1) the Order at issue involves a controlling issue of law, which, if erroneously decided, would result in reversible error upon final appeal; (2) substantial ground for difference of opinion exists regarding the resolution of the issue; and (3) an immediate appeal will materially advance the ultimate termination of the litigation. *See Levine v. United Healthcare Corp.*, 285 F. Supp. 2d 552, 556-57 (D.N.J. 2003) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754-55 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974)). If satisfied, these factors exhibit the "exceptional circumstances" upon which a district court may base its decision to grant interlocutory review. *See Levine*, 285 F. Supp. 2d at 556. Notably, "a party's mere disagreement with the district court's

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[3] The Court observes that a motion to certify for interlocutory appeal may be brought directly under 28 U.S.C. § 1292(b).

ruling does not constitute a 'substantial ground for difference of opinion. . .' " *Cardona v. General Motors Corp.*, 939 F. Supp. 351 (D.N.J. 1996). It is within a district court's discretion to deny interlocutory review even if each factor is satisfied. *See Harter v. GAF Corp.*, 150 F.R.D. 502, 517 (D.N.J. 1993) (citing *Bachowski v. Usery*, 545 F.2d 363, 368 (D.N.J. 1976)). Each of these three elements is examined in turn.

A. Controlling Question of Law

There is only one issue of law that Burlington and Essex Defendants seek to certify for interlocutory appeal:

> Whether a blanket policy of strip searching all inmates upon admission to a county correctional facility is violative of the inmates' constitutional rights?

(Burlington Def. Br. 4; Essex Def. Br. 3.) Burlington and Essex Defendants contend this question necessarily involves a controlling issue of law, which, if erroneously decided, would result in reversible error upon final appeal. (Burlington Def. Reply Br. 2; Essex Reply Br. 1.) Plaintiff cannot reasonably dispute Defendants' contention in this regard. Although the Court disagrees with the framing of the issue as presented by Burlington and Essex Defendants, it is clear that the issue nevertheless involves a controlling question of law.[4] If, for example, the Third Circuit

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[4] The Court frames the issue in accordance with its limited holding of *Florence II*, namely:

> whether a blanket policy of strip searching all non-indictable arrestees admitted to a county correctional facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States

rules contrary to this Court's decision in *Florence II*, *see generally* 595 F. Supp. 2d 492 (D.N.J. 2009), and finds that a blanket policy of strip searching non-indictable arrestees admitted to a county correctional facility without first articulating reasonable suspicion does not offend the Fourth Amendment, then this Court would have necessarily committed reversible error. As the Third Circuit in *Katz* reasoned, "controlling means serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755 (citations omitted). Here, the Fourth Amendment question is clearly serious to the conduct of the litigation in a practical and legal sense. Therefore, the first element required for certification is satisfied pursuant to 28 U.S.C. § 1292(b).

B. Substantial Grounds for Difference of Opinion

The next element that must be satisfied asks whether substantial grounds for difference of opinion exist regarding the resolution of the issue. Burlington and Essex Defendants deftly observe this Court's discussion of the split of authority on the Fourth Amendment issue in its Opinion and Order dated February 4, 2009. (Burlington Def. Br. 4; Essex Def. Br. 3.) Under a subsection entitled "Competing Authority", *see Florence II*, 595 F. Supp. 2d at 508-11, the Court discussed *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc)—an Eleventh Circuit case that splits with the majority of Circuits on this issue. *See Powell*, 541 F.3d at 1314 (subjecting arrestees to visual strip searches during the booking process without reasonable suspicion does not offend the

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Constitution as applied to the States through the Fourteenth Amendment?

Fourth Amendment). The Court also discussed *Bull v. City and County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), rehearing *en banc* granted, 558 F.3d 887 (2009), and *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003). With respect to *Henson*, this Court distinguished that case because it involved a clothing-exchange procedure far less intrusive than the strip searches of the instant case. See *Florence II*, 595 F. Supp. 2d at 508 ("While the purpose of the search was similar to the instant case, the means to serve that purpose were decidedly less intrusive."). With respect to *Bull*, this Court noted that it "held in concert with the majority of circuits" opining on this issue. *See Florence II*, *supra*, at 508. Nevertheless, because of the vigorous concurrence of Circuit Judge Ikuta, *see Bull*, 539 F.3d at 1202-05, this Court examined that case as if it suggested a new approach to the analysis of strip search cases dealing with newly admitted non-indictable/misdemeanor offenders. *Florence II*, *supra*, at 507. As noted above, the Ninth Circuit recently granted an en banc rehearing of its *Bull* decision. *See Bull*, *supra*, 558 F.3d 887 (9th Cir. 2009).

In light of *Powell*, *supra*, and the Ninth Circuit's significant decision to rehear *Bull*, *supra*, Burlington and Essex Defendants contend substantial grounds for difference of opinion exist regarding the resolution of the Fourth Amendment strip search issue. (Burlington Def. Reply Br. 2; Essex Def. Reply Br. 3 n.1.) In response, Plaintiffs observe that Defendants cite no split of authority within this District.[5] (Pl. Opp'n Br.

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[5] In this regard, Plaintiffs suggest contrary authority must exist within the Court's District or Circuit in order to find that substantial grounds for difference of opinion exist. Plaintiffs cite *Cardona*, *supra*, 939 F. Supp. at 351-53, to substantiate this

3.) This observation is accurate. Indeed, the Court relied in part on existing persuasive authority from the District of New Jersey when it ruled the instant searches of non-indictable arrestees violated the Fourth Amendment. *See Florence II*, *supra*, at 505-06 (citing *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610, 622 (D.N.J. 1990); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220, 225 (D.N.J. 1990); *O'Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429, 434 (D.N.J. 1988); *Wilkes v. Borough Clayton*, 696 F. Supp. 144, 149 (D.N.J. 1988); *Davis v. City of Camden*, 657 F. Supp. 396, 401 (D.N.J. 1987)). Nevertheless, it is not improper—as Plaintiffs suggest—to look to jurisdictions outside the one in which the Court sits when examining whether substantial grounds for disagreement on a given issue exist.[6] *See Levine*, 285

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contention. That case, however, is inapposite. *Cardona* involved a motion to certify for interlocutory appeal the decision to disqualify attorneys from further representation of the plaintiffs. *Id.* at 352. In denying the motion, the district court regarded extra-jurisdictional precedent as irrelevant to the court's limited inquiry. *Id.* at 354. The appellants pointed to a case in the Eastern District of Pennsylvania where the Court, faced with the same issue of disqualification, reached the opposite result of the District of New Jersey. *Id.* Distinguishing the cases, Judge Orlofsky for the District of New Jersey attributed any difference of opinion to "each court's respective obligation to interpret and apply its own, state-based Rules of Professional Conduct." *Id.* at 355. By contrast, the instant case involves a federal question arising under the Fourth Amendment to the United States Constitution. Looking to extra-jurisdictional authority is far from inappropriate in such a circumstance.

[6] The fact that this Court analyzed *Powell* and ultimately rejected its "contrarian holding" as "less than compelling", *see Florence II*, *supra*, at 511, does not in any way subtract from the weight of that Eleventh Circuit opinion. Just because this Court disagreed with *Powell*'s reasoning does not mean that *Powell* ceases to exist.

F. Supp. 2d at 566 (finding substantial ground for disagreement after examining decisions outside the district (citing *Arana v. Ochsner Health Plan, Inc.*, 302 F.3d 462 (5th Cir. 2002), rehearing *en banc* granted, 319 F.3d 205 (2003); *McKandes v. Blue Cross and Blue Shield Assoc.*, 243 F. Supp. 2d 380 (D.Md. 2003); *Popoola v. MD-Individual Practice Assoc.*, 244 F. Supp. 2d 577 (D.Md. 2003))); *see also* n.5 of this Memorandum Opinion.

Due to *Powell* and the recent decision by the Ninth Circuit to grant an *en banc* rehearing of *Bull*, substantial grounds for difference of opinion exist on whether non-indictable arrestees admitted into a jail facility can be strip searched without first articulating reasonable suspicion that they have drugs, weapons, or other contraband. Therefore, the second element required for certification is satisfied under 28 U.S.C. § 1292(b).

C. Materially Advance the Termination of the Litigation

Certification of this Fourth Amendment issue will materially advance the termination of the litigation. For example, if the Third Circuit affirms the central holding of *Florence II*, then this Court can proceed directly to the issue of damages. If, however, the Third Circuit reverses this Court, Plaintiffs' main contention will fail as a matter of law. In either circumstance, certifying the Fourth Amendment question will materially advance the termination of the litigation.

Powell does exist; it is fitting, therefore, to afford it some weight in the instant analysis. Plaintiff's contention that a "sheer contradiction" results from Defendants' reliance on *Powell* in advancing this motion, after this Court disagreed with it in *Florence II*, is without merit. (Pl. Opp'n Br. 4.)

Moreover, the Court acknowledges that a ruling by the Third Circuit on this issue may also materially advance the termination of cases similar to the instant one throughout the District, as evidenced by several *amicus curiae* letter briefs. Although the outcome of those cases has no bearing on this Court's decision to grant certification, they are worthy of mentioning given the peculiar ubiquity of similar litigation throughout the District.

III.

In light of the foregoing, this Court grants the motions of Burlington and Essex Defendants to amend the Court's Order of February 4, 2009 by certifying the judgment on the cross-motions for summary judgment as final, pursuant to 28 U.S.C. § 1292(b). Certification of the Fourth Amendment issue will materially advance the termination of the litigation. There is a substantial ground for difference of opinion on whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment. Because that issue necessarily involves a controlling question of law, and because this Court deems it proper, that question is hereby certified under 28 U.S.C. § 1292(b) for interlocutory appeal to the United States Circuit Court for the Third Circuit. Defendants' motions [Dkt. Entry Nos. 165, 166, 167] are granted. An appropriate Order shall follow.

ORDER

AND NOW, This matter having come before the Court on motions by Defendants Board of Chosen

Freeholders of the County of Burlington, Warden Jule Cole in his Official and Individual Capacity, and Burlington County Jail [Dkt. Entry Nos. 165 & 167], and Essex County Correctional Facility and Essex County Sheriff's Department [Dkt. Entry No. 166], to amend/correct the Order of February 4, 2009 by certifying the judgment of law on cross-motions for summary judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b); and

The Court having fully considered the matter; and

The Court having found its Order of February 4, 2009 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that Order may materially advance the ultimate termination of the litigation;

It is hereby ORDERED AND ADJUDGED, this *30th* day of June, 2009, that Burlington and Essex Defendants' motions [Dkt. Entry Nos. 165, 166, 167] are GRANTED. The Order of February 4, 2009 is amended, and the following issue is certified for interlocutory appeal:

> whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment;

IT IS FURTHER ORDERED that proceedings in *Florence v. Board of Chosen Freeholders of the County of Burlington*, 05-3619 (JHR) be, and hereby are,

STAYED pending resolution of this issue before the United States Court of Appeals for the Third Circuit.

It is SO ORDERED.

Joseph H. Rodriguez
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 05-cv-3619

ALBERT W. FLORENCE,

Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Defendants.

February 4, 2009

OPINION

RODRIGUEZ, Senior District Judge.

This matter comes before the Court on cross-motions for summary judgment filed by Albert W.

Florence ("Florence" or "Plaintiff") and Defendants. Plaintiff represents a class certified by this Court as:

> All arrestees charged with non-indictable offenses who were processed, housed or held-over at Defendant Burlington County Jail and/or Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.

Defendants named in the complaint are Board of Chosen Freeholders of the County of Burlington, Burlington County Jail ("Burlington Jail), Warden Juel Cole, Individually and Officially as Warden of Burlington County Jail, Essex County Correctional Facility ("Essex Jail"), Essex County Sheriff's Department and several John Does.

Plaintiffs seek:

1. Summary judgment on the issue of law regarding whether Defendants violated Plaintiffs' constitutional rights by their policy of strip searching non-indictable arrestees without reasonable suspicion;

2. Preliminary injunctive relief on behalf of the class against Defendants Burlington and Essex Counties' strip search policies.

Defendants seek:

1. Summary Judgment on the issue of law regarding whether the strip searches were constitutional;

2. Eleventh Amendment immunity for the Board of Chosen Freeholders of Burlington County, Warden Juel Cole in his official capacity, and Burlington County Jail;

3. Qualified Immunity for Warden Juel Cole in his individual capacity;

4. Dismissal of Count Five – § 1983 Municipality Custom Violations regarding Essex County.[1]

For the reasons expressed below, Plaintiffs' motions are granted in part and denied in part. Defendants' cross-motions for summary judgment are denied, and the claims for Eleventh Amendment immunity and qualified immunity are also denied. Defendant's claim to dismiss the § 1983 Municipality Custom Violations Count is denied.

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiffs' 42 U.S.C. § 1983 claim for violation of their federal constitutional rights.

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[1] For whatever reason, there are two Count Fives in Plaintiffs' First Amended Complaint. The 'Count Five' referred to in this Opinion should actually be Count Seven, if properly labeled in the First Amended Complaint. (Am. Compl. at ¶¶ 80-88.) For purposes of consistency, however, it remains as labeled–'Count Five.'

II. FACTUAL & PROCEDURAL BACKGROUND

A. Facts Relating to Plaintiff's Arrest, Detention, and Alleged Strip Searches

The parties are familiar with the facts of this case. For purposes of summary judgment, however, the facts shall be provided herein, in large measure undisturbed from this Court's previous opinion certifying the class. See *Florence v. Bd. of Chosen Freeholders*, 2008 WL 800970, *1-*5 (D.N.J. March 20, 2008).

On March 3, 2005, Florence was a passenger in his sport utility vehicle, which was being driven by his wife on Interstate Highway 295 in Burlington County. (*See* Pl.'s Statement of Undisputed Material Facts at ¶ 1.) The vehicle was stopped by a New Jersey State Trooper, who directed Florence to exit the vehicle. (*Id.* at ¶ 2.) Florence was arrested based on an Essex County bench warrant that was issued on April 25, 2003. (*Id.*) Florence contends that the warrant charged him with a form of civil contempt that is a non-indictable offense. (*Id.* at ¶ 3.) In fact, the warrant related to a fine which Florence had already paid. (*Id.*) Despite Florence's protests about the warrant's validity, he was taken by the State Trooper to the Burlington Jail. (*Id.* at ¶ 3.)

At the jail, Florence was subjected to what he alleges was a full strip and body cavity search.[2] (*Id.* at ¶ 3.) According to his deposition testimony, an officer

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[2] While not binding on this Court, it is helpful to note that New Jersey law defines a strip search as "the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts." N.J. STAT. ANN. § 2A:161A-3.

directed him to remove all his clothing and, while nude, open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals. (*Id.*) Florence complied with these requests while the officer sat approximately one arm's length in front of him. (*Id.* at ¶ 4.) The officer then instructed Florence to shower. (*Id.*) In the end, Florence was held at the Burlington Jail for six days. (*Id.*)

After the sixth day, the Essex County Sheriff's Department collected Florence and transported him to the Essex Jail. (*Id.* at ¶ 5.) Upon his arrival, Florence was processed and again subjected to what he alleges was a full strip and body cavity search. (*Id.*) According to Florence's deposition testimony, Essex Jail officers told him and four other arrestees to enter separate shower stalls, strip all their clothing and shower. (*Id.* at ¶ 6.) Florence and the other arrestees complied by completely removing their clothes while two officers watched. (*Id.*) Florence then showered, and was directed to open his mouth and lift his genitals. (*Id.*) Next, he was ordered to turn around so that he faced away from the officers, after which time he was told to squat and cough, and then turn back around to face front. (*Id.* at ¶ 7) Following this episode, Florence was placed with the general jail population until the next day when the charges against him were dismissed. (*Id.*)

B. Evidence in the Record

The following subsections detail the intake procedures at Burlington and Essex, respectively. Although the parties are familiar with this evidence, *see Florence, supra*, at *1-*5, the Court reincorporates

the pertinent details as they relate directly to the instant cross-motions for summary judgment.

1. Burlington Jail's Procedures

Burlington Jail's intake procedures are based on the document – "Policies and Procedures: Search of Inmates – No. Section 1186" (hereinafter "Section 1186"). (*See* Pl.'s Statement of Undisputed Material Facts at ¶ 8.) Section 1186 defines a strip search as "a physical search of an inmate . . . while unclothed consisting of routine and systematic visual observation of the inmate's physical body to look for distinguished identifying marks, scars or deformities, signs of illness, injury or disease and/or the concealment of contraband on the inmate's body." (*Id.* at ¶ 9.) The document also provides that "[a] person who has been detained or arrested for commission of an offense other than a crime[3] . . . shall not be subject to a strip-search unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found." (*Id.* at ¶ 10.)

Several Burlington Jail officers and Warden Cole testified in depositions about these procedures. Lieutenant Douglas Chilton has worked for the Burlington Jail since 1997. (*Id.* at ¶12.) He executed a document related to Plaintiff's alleged strip search entitled "Strip Search Authorization Form." (*Id.*) This form indicates that Plaintiff was not strip searched, per se. (*Id.*) Lieutenant Chilton testified during his deposition that arrestees who are brought in for non-indictable offenses are subjected to a "visual

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[3] New Jersey law provides no right to indictment by a grand jury for offenses other than crimes. *See* N.J. STAT. ANN. § 2C:1-4(b). Such offenses are aptly dubbed "non-indictable."

observation," while those admitted for indictable offenses are strip searched. (*Id.* at ¶ 13.) He further testified that Plaintiff's Strip Search Authorization Form was marked "not strip searched" because he was admitted for a "failure to appear," which is a non-indictable offense, and which mandates only a visual observation during intake. (*Id.*)

Officer Haywood Reeder has worked at the Burlington Jail since 1990. (*Id.* at ¶ 14.) He confirmed that arrestees admitted for non-indictable offenses, such as civil contempt, should not be strip searched. (*Id.*) Relatedly, he defined a strip search as searching various parts of a nude inmate's body for contraband, scars, marks, or tattoos. (*Id.* at ¶ 15.) He also testified that all inmates are subjected to a visual observation irrespective of whether they are indictable or non-indictable. (*Id.* at ¶ 16.) According to Officer Reeder, a visual observation includes: (1) checking a nude arrestee for scars, marks, and tattoos while he strips for a mandatory shower; (2) instructing the nude arrestee on the application of a delousing agent; and (3) instructing the nude arrestee to change into jail clothing following his shower. (*Id.* at ¶ 17.)

Officer Charles Palmer has worked for the Burlington Jail since 2000. (*Id.* at ¶ 18.) He also testified that arrestees admitted for non-indictable offenses are subjected to a visual observation. (*Id.*) Officer Palmer further testified that a visual observation involves taking an inmate into the shower area, having him remove all his clothing, directing him to turn around – while nude – so the officer can look for bruises and distinguishing marks, and then having the inmate take a shower. (*Id.* at ¶ 19.) According to

Officer Palmer, the difference between a visual observation and a strip search is that, with the latter, officers direct arrestees to spread their buttocks and/or lift their genitals. (*Id.* at ¶ 20.) However, he acknowledged that he has found genital piercings and tattoos during visual observations, (*id.*), which suggests there is a cursory examination of genitalia during a visual observation.

Officer Sean Gallagher has worked for the Burlington Jail since 1996. (*Id.* at ¶ 21.) Similar to the other officers, he testified that non-indictable arrestees, such as those arrested for civil contempt, are subjected to a visual observation. (*Id.*) He further testified that a visual observation entails taking the arrestee to a shower room, having him remove his clothing and turn around while the officer looks at the arrestee's nude body to check for scars, marks, tattoos, and body vermin, before finally instructing the arrestee to shower with a delousing agent. (*Id.* at ¶ 22.) During these visual observations, Officer Gallagher directs inmates with hanging genitalia to lift their genitals in order to look for contraband, scars, marks, and tattoos. (*Id.* at ¶ 23.) When asked how this differed from a strip search, Officer Gallagher explained that strip searches are "a little more thorough," and involve having the inmate bend over and spread his buttocks so the officer can "get a view of their anus to see if there is anything that would be suspicious looking . . . ." (*Id.* at ¶ 24.) In any event, Officer Gallagher acknowledged that all arrestees, whether indictable or non-indictable, are required to take off their clothing while the officer visually observes them and has them turn around. (*Id.* at ¶ 25.) According to Officer Gallagher, this procedure is

required by the Burlington Jail's custom and practice, which every corrections officer follows. (*Id.* at ¶ 26.)

Lieutenant Jerry Coleman has worked at the Burlington Jail since 1990. (*Id.* at ¶ 27.) He testified that arrestees who are not indictable are subjected to a visual observation as part of the intake process. (*Id.*) According to Lieutenant Coleman, a visual observation involves an officer taking the arrestee to a shower room whereupon the arrestee removes his clothing and turns around so as to allow the officer to check the arrestee's front and back for deformities, bruises, marks, tattoos, and puncture wounds. (*Id.* at ¶ 28.) Lieutenant Coleman also drew a distinction between a visual observation and a strip search, claiming that the latter requires arrestees to bend down, squat, and lift their genitals. (*Id.* at ¶ 29.)

Lastly, Warden Juel Cole has worked at the Burlington Jail since 1976 and has been its warden since 1997. (*Id.* at ¶ 30.) Like the officers, Warden Cole confirmed that an arrestee admitted for a non-indictable offense is subjected to a visual observation, which involves an officer "mak[ing] a quick check" on a nude inmate while he changes clothing or during his shower for bruises, tattoos, or "any item like that of any importance." (*Id.* at ¶ 31) Sometimes, though apparently not always, the officer conducting the visual observation will direct the nude arrestee to turn around to facilitate a full check of the arrestee's entire body. (*Id.* at ¶ 32.) Warden Cole acknowledged that if he directed an inmate to remove his clothing, he would be telling the inmate to "strip". (*Id.* at ¶ 33.) However, according to Warden Cole, a visual observation of an arrestee's nude body does not constitute a "search"

under the Burlington Jail's definition of that term. (Cole Dep. 31:11-16, Nov. 30, 2006.)

2. Essex County Correctional Facility's Procedures

Essex Jail intake procedures during the relevant class period are based on two documents: (1) a document entitled "Department of Public Safety: General Order No. 89-17" (hereinafter "Order No. 89-17"); and (2) one called "Department of Corrections: Administrative Directive No. 04-06" (hereinafter "Directive No. 04-06").[4] (*See* Pl.'s Statement of Undisputed Material Facts at ¶ 34.) Order No. 89-17 went into effect in September 2002 and provides that, upon arrival at the Essex Jail, all arrestees shall be strip searched and then required to shower. (*Id.* at ¶ 35.) It further states that a strip search is to consist of having an arrestee undress completely. (*Id.* at ¶ 36.) Officers are supposed to "observe carefully while the inmate undresses." (*Id.*) Moreover, officers are to examine the interior of the arrestee's mouth; his or her ears, nose, hair and scalp; his or her fingers, hands, arms, and armpits; and all body openings and the inner thighs. (*Id.* at ¶ 37.)

Order No. 89-17 was superceded in April 2005 by Directive No. 04-06. The latter document provides that officers are required to "[c]onduct a thorough search of individual inmates[.]" (*Id.* at ¶ 38.) It further directs officers to have all arrestees shower during intake. (*Id.*

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[4] Order No. 89-17 and Directive No. 04-06 were attached as "Exhibit D" to an August 2, 2007 certification made by Michael Calabro, co-counsel for Plaintiff. These submissions were initially provided by Defendant Essex as part of their discovery response. (Pl. Br. at 12.) The Court cites Order No. 89-17 as Exhibit D(1) and Directive No. 04-06 as Exhibit D(2).

at ¶ 39.) Officers are required to "[o]bserve and document" any evidence of body markings, vermin or disease, sores, wounds, and other injuries. (*Id.* at ¶ 40.) In contrast with Order No. 89-17, Directive No. 04-06 facially prohibits strip searching non-indictable arrestees in the absence of reasonable suspicion that the search will produce weapons, drugs, or contraband. (*Id.* at ¶ 41.)

Essex Jail officers and Warden Glover testified about intake procedures at that facility. Sergeant Thomas Logue has worked for the Essex Jail since 2005, and was on intake duty on March 9, 2005, the night Plaintiff was booked. (*Id.* at ¶ 42.) He testified that, for intake processing purposes, all arrestees are treated the same, without any distinction based on whether the arrestee is accused of an indictable or a non-indictable offense. (*Id.* at ¶ 43.) According to Sergeant Logue, officers call up to three arrestees at a time to enter the shower area during processing. (*Id.*) Once there, corrections officers direct the arrestees to remove their clothing and place them into gray bins. (*Id.* at ¶ 44.) The arrestees then simultaneously undress while the officers view their nude bodies. (*Id.*) Toward the end of his testimony, Sergeant Logue reiterated that the same intake procedures are conducted for all arrestees irrespective of the nature of the charged offence. (*Id.* at ¶ 45.)

Officer Richard Monroig has worked at the Essex Jail since 1995. (*Id.* at ¶ 46.) Like Sergeant Logue, Officer Monroig testified that arrestees are never segregated based on the nature of their offense – i.e., indictable versus non-indictable – during the intake process. (*Id.*) Officer Monroig candidly explained that

processing officers are not even trained as to which charges are indictable and which are not indictable. (*Id.* at ¶ 47.) According to Officer Monroig, as part of the intake process, arrestees are lead, three at a time, to a shower area where officers direct them to remove their clothing and shower. (*Id.* at ¶ 48.) The arrestees then take their clothes off and stand nude while an officer watches. (*Id.*)

Lieutenant Michael Salzano has worked for the Essex Jail since 1987. (*Id.* at 49.) He works in the shower room daily and is very familiar with the Essex Jail's intake procedures. (*Id.*) These procedures include a mandatory shower. (*Id.* at ¶ 49.) Consistent with the previous testimony, Lieutenant Salzano testified that officers bring up to three arrestees into the shower room at a time, and direct them to remove their clothing and take a shower. (*Id.* at ¶ 50.) Lieutenant Salzano testified that this procedure is the same regardless of whether the arrestee is admitted for an indictable or non-indictable offense. (*Id.* at ¶ 51.)

Lastly, Warden Larry Glover has been the warden at the Essex Jail since 2004. (*Id.* at 52.) He testified that arrestees are searched to ensure they carry no contraband. (*Id.*) This process includes having as many as three arrestees enter the shower area and remove their clothing, which officers proceed to search. (*Id.* at ¶ 53.) The arrestees shower shortly thereafter and then are directed to put on jail-issued clothing. (*Id.* at ¶ 54.)

C. Summary Judgment Cross-Motions

Plaintiffs move for summary judgment, claiming that the procedures described above amount to unconstitutional strip searches even if, in the case of

Burlington Jail, the procedures are termed a "visual observation" or if, in the case of the Essex Jail, the written policy now facially complies with New Jersey's strip searching rules. *See Florence*, *supra*, at *5. Plaintiffs specifically allege that

> the undisputed facts establish that Defendants' policy of strip-searching all arrestees without individualized suspicion is a violation of clearly established constitutional law.

(Pl. Br. at 16.) Plaintiffs further allege that Defendants "admit that every unnamed class member ... has been ordered" to completely disrobe and stand nude upon admission to the jail facilities, "without Defendants first articulating a reasonable basis to do so." (*Id.*) Citing persuasive albeit non-binding case law, Plaintiffs contend that, at minimum, individualized reasonable suspicion for weapons, drugs, or other contraband must first exist before a jail official may strip search anyone charged with a non-indictable offense. (*Id.* at 15.) Because no reasonable suspicion existed before the instant searches took place, Plaintiffs maintain that the searches violated their Fourth Amendment rights. (*Id.*) Plaintiffs consequently assert an action arising under 42 U.S.C. § 1983, claiming violation of their federal constitutional rights. Plaintiffs seek preliminary injunctive relief against Burlington and Essex County Jails.[5]

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[5] In their brief, Plaintiffs also passingly ask this Court for counsel fees. (*See* Pl. Br. at 2 ("Plaintiff requests counsel fees.")) This Court notes that, pursuant to 42 U.S.C. § 1988(b), a "prevailing party" in a § 1983 action is entitled to "reasonable" counsel fees.

Defendants Burlington and Essex answer in their cross-motions that the visual observations/strip search policies are constitutional, and they point to a recent trend in the Circuit Courts of Appeal to substantiate this claim.[6] In doing so, Defendants ask this Court to revisit the holding of *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987), contending that it cannot withstand the "weight" of modern authority. (*See* Def. Burlington Reply Br. at 16.) Next, Defendants contend that the Board of Chosen Freeholders of Burlington County, Warden Cole in his official capacity, and Burlington County Jail are entitled to immunity as arms of the State of New Jersey pursuant to the Eleventh Amendment. Defendant Warden Cole in his individual capacity contends that he is entitled to qualified immunity, thereby barring money damages against him. Finally, Defendant Essex seeks dismissal of the § 1983 arrest claim by Plaintiff, contending it is invalid. These claims are discussed in turn.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted "if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of

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See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Yet, consistent with Federal Rule of Civil Procedure 23(h), a request for counsel or attorney's fees must be made by motion and "must be filed no later than 14 days after the entry of judgment." *See* Fed. R. Civ. P. 54(d)(2)(A) - (B). As such, Plaintiffs' request shall not be addressed at this time.

[6] While eight circuits have addressed the issue at bar, the Third Circuit has yet to provide this Court with controlling authority.

law." *See Pearson v. Component Tech. Corp.*, 247 F.3d 471, 482 n.1 (3d Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *accord* Fed. R. Civ. P. 56(c). This Court will enter summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(c).

An issue is "genuine" if it is supported by such evidence that a reasonable jury could return a verdict in the nonmoving party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*; *see also Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994). Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and

affirmative evidence that contradict those offered by the moving party. *Andersen*, 477 U.S. at 256-57. "A nonmoving party may not 'rest upon mere allegations, general denials or ... vague statements . . . ' " *See Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890 (3d Cir. 1992) (quoting *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991)).

In deciding the merits of a party's motion for summary judgment, the Court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Credibility determinations are the province of the finder of fact. *See Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). If there is no genuine issue of material fact upon review of cross-motions for summary judgment, then judgment may be entered in favor of the deserving party in light of the law and undisputed facts. *See Iberia Foods Corp. v. Romeo Jr.*, 150 F.3d 298, 302 (3d Cir. 1998) (citing *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 145-46 (3d Cir. 1998)).

B. Analysis

In the instant case, the first issue is whether the intake procedures of Burlington and Essex County are so intrusive that they rise to the level of "strip search". Assuming they do, and there is no genuine issue of material fact to dispute, then the question of the constitutionality of the searches, performed without reasonable suspicion, must be addressed. On this latter issue, a circuit split has recently developed.

1. The Nature of the Burlington and Essex Intake Procedures

Dealing first with Burlington County, there is no genuine issue of material fact as to whether the "visual observations" constitute a search under the Fourth Amendment. Each officer who testified admitted that everyone who enters the Burlington County Jail is subject to a visual observation, regardless of whether that person is an indictable or non-indictable offender. This blanket policy entails a complete disrobing, followed by an examination of the nude inmate for bruises, marks, wounds or other distinguishing features by the supervising officer, which is then followed by a supervised shower with a delousing agent.

According to Burlington officers, the only distinction between a "strip search" and a "visual observation" is the thoroughness of the search. (*See* Pl.'s Statement of Undisputed Material Facts at ¶ 24.) Thus, whereas a strip search involves squatting, bending one's buttocks, and in the case of male inmates–lifting one's genitalia, (*see id.* at ¶ 20), a visual observation involves the slightly less intrusive procedure described above. There is one discrepancy in the record, however. According to Officer Gallagher, male inmates during visual observations are directed to lift their genitals. (*Id.* at ¶ 23.) To him, a strip search is more thorough because of its attendant anal cavity inspection. (*Id.* at ¶ 24.) The other Burlington officers who distinguish a strip search from a visual observation testified that a genital lift is done only in the case of a strip search. (*See, e.g.*, Pl.'s Statement of Undisputed Material Facts at ¶¶ 17-20, 29.)

Whatever the case may be, a discrepancy of this sort does not necessarily provide a genuine issue of material fact. At oral argument, counsel for Plaintiff remarked – "It's just common sense. Take off all your clothes. You're stripped searched. A visual observation is a matter of semantics." (Oral Arg. Tr., 13:6-9, Nov. 10, 2008.) Even if Warden Cole maintains that the visual observation of an incoming inmate does not constitute a search under the jail's definition of the word, (Cole Dep. at 31:11-16), that definition is of no consequence here. A visual observation is a search as defined by the Fourth Amendment. *See Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995) (noting that "observation is a form of search."). Whether it is called a 'strip search' or a 'visual observation'–the distinction going only to the intrusiveness of the search–it is still a search for purposes of Fourth Amendment analysis. *See, e.g.*, *Stanley v. Henson*, 337 F.3d 961, 964 n. 2 (7th Cir. 2003). The only question then, is whether the searches of non-indictable offenders are unreasonable when conducted pursuant to a blanket policy without reasonable suspicion. *See infra* Part III.B.2.

As for Essex, there is no attempt to distinguish between a 'visual observation' and a 'strip search'. When Plaintiff was arrested on March 3, 2005, Order No. 89-17 was in effect.[7] (Pl.'s Statement of Undisputed Material Fact at ¶¶ 35-38.) That order required all incoming arrestees to be strip searched.

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[7] As stated above, Order No. 89-17 was superceded by Directive No. 04-06 in April 2005, which facially prohibits the strip searching of non-indictable arrestees in the absence of reasonable suspicion of weapons, drugs, or contraband. (Calabro Cert., 8/2/2007, Ex. D(1), p.3, § VII.c.8.) For discussion of the relevance of Directive No. 04-06, *see infra* Part III.3.

(*Id.* at ¶ 35.) Like Burlington, inmates were instructed to take a supervised shower. (*Id.* at ¶¶ 35–37.) Also like Burlington, inmates were not segregated on the basis of indictable versus non-indictable offense. (*Id.* at ¶ 43.) The only difference between the two counties' procedures was the extent of the search. Essex officers carefully observed the entire naked body of the inmate, including body openings and inner thighs. (*Id.* at ¶ 37.) If the less-intrusive Burlington procedure constitutes a search for purposes of the Fourth Amendment, it follows that the more-intrusive Essex procedure also constitutes a search.

Defendant Essex County curiously contends that because its witnesses denied "that there was a custom or policy of strip-searching . . . the alleged class in the case at bar", summary judgment should not be granted. (Def. Essex Br. at 26-27.) Essex further contends that, as a result, "Plaintiff has failed to establish a *Monell* violation."[8] (Def. Essex Br. at 25.) Not advancing these claims pursuant to any Federal Rule of Civil Procedure, Essex seemingly argues that because Plaintiffs cannot establish a custom or policy on behalf of Essex County, (*id.*), summary judgment in favor of Plaintiffs should not be granted. Essex apparently seeks to raise a question of fact as to whether the strip searches even occurred. Plaintiffs quickly respond by citing the formal strip search policy

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[8] *Monell v. New York City Dept. Of Soc. Services* holds that "local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *See* 436 U.S. 658, 690 (1978).

in place from 2002 until 2005, entitled "Directive 89-17", *see supra*. (Pl. Opp'n Br. at 7.) That policy mandated that every person shall be strip searched upon intake. (*Id.*) In light of that policy, there is no genuine issue of material fact to prevent summary judgment in favor of Plaintiffs. Once again, the only question is whether the search procedure of non-indictable offenders is unreasonable when it is performed pursuant to a blanket policy without reasonable suspicion.

2. Constitutionality of the Intake Procedures

The Supreme Court applied a Fourth Amendment[9] analytical framework to the body searches of pre-trial detainees in the landmark case of *Bell v. Wolfish*, 441 U.S. 521, 559 (1979). In that case, a federal short-term custodial facility required pre-trial detainees to strip after each contact visit from an outside visitor. *Id.* at 558. The strip search enabled the officers to conduct a visual cavity inspection. *Id.* Detection and deterrence of drugs, weapons, or other contraband was the stated goal of the correctional facility in conducting the strip searches. *Id.* The question before the Supreme Court was "whether visual body-cavity inspections as contemplated by the . . . rules can ever be conducted on

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[9] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

less than probable cause." *Id.* at 560 (alteration to original) (emphasis added).

The Court began its analysis by assuming that "convicted prisoners and pretrial detainees[] retain some Fourth Amendment rights upon commitment to a corrections facility . . . " *Id.* at 558. The Court then outlined a four-prong test to balance "the need for the particular search against the invasion of personal rights that the search entails." *Id.* Specifically, the Supreme Court opined:

> Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. Applying the balancing test to the facts of that case,[10] the Supreme Court held that the searches did not offend the Fourth Amendment. *Id.* at 558 ("The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.") (internal citations omitted). The Court further held that the correctional facility could conduct such searches on less than probable cause. *Id.* at 560. This holding resulted from a careful balancing of the "significant and legitimate interests of the institution against the privacy interests of the inmates . . . " *Id.*

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[10] Inmates at the prison facilities were 10 required to expose their body cavities for visual inspection as part of a strip search performed after each contact visit with a person from outside the facility. *Bell*, 441 U.S. at 558. The jail administrators justified the practice on the bases of discovery and deterrence of "weapons, drugs, and other contraband." *Id.*

In the thirty years since *Bell*, the issue left ostensibly open for the lower courts is whether reasonable suspicion is a minimal-threshold requirement for strip searches of incoming inmates or pretrial detainees. That issue was not addressed by the Supreme Court in *Bell*, which dealt only with contact visits from outside visitors. Since that time, however, nine Circuit Courts of Appeal and several District Courts have addressed the issue. These decisions provide useful guidance for the Court.

i. Bell *Progeny*

A district court in New Jersey first required reasonable suspicion to strip search inmates in *Davis v. City of Camden*, 657 F. Supp. 396, 401 (D.N.J. 1987) (holding that a plaintiff's Fourth Amendment rights were violated when she was strip searched without reasonable suspicion, as part of a blanket policy applied by a jail). In that case, the plaintiff accompanied police officers to the station house to lodge a formal complaint against her neighbor. *Id.* at 398. For whatever reason, the police ran a computer check on the plaintiff, which indicated several outstanding warrants for parking ticket violations, in addition to an assault and battery charge which had been issued some four years prior to the date of the computer check. *Id.* The plaintiff was arrested, and thereafter strip searched upon her arrival at the county jail.[11] *Id.* The officers conceded that reasonable suspicion for contraband was not present; instead they

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[11] Specifically, the plaintiff in *Davis* was told to remove all of her clothes and squat, so the female jail matron could conduct a visual inspection of her orifices. *Davis*, *supra*, at 398.

justified the search pursuant to N.J. ADMIN. CODE 10A:31-3.12(2) (1979).[12] *Id.* at 399.

Addressing the constitutionality of the search, the Honorable Mitchell H. Cohen underscored the then-unanimous Circuit Courts of Appeal, and held that "there must be a 'reasonable suspicion' that an arrestee is concealing weapons or contraband in order for a strip search to be constitutionally justified." *Id.* at 399. Judge Cohen specifically cited the reasoning of the Second Circuit, recognizing that:

> reasonable suspicion that a particular arrestee is concealing weapons or contraband can arise, not only from the specific circumstances relating to the arrestee or the arrest, but also from the nature of the charged offense.

Id. at 400 (citing *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986)). Thus, the Court reasoned that a policy that mandates strip searches for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such policy contains an implicit recognition of reasonable suspicion, albeit a general one. *See Davis*, 657 F. Supp at 400-401. The policy at issue in *Davis*, however, did not so limit the search to drug-related or weapons-related offenses. Rather, it mandated strip searches

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[12] That Administrative Code provision provided in relevant part:

> All newly admitted inmates shall be thoroughly searched. Each newly admitted inmate shall be strip searched for weapons and contraband. This search also shall include a check for body vermin, cuts, bruises, needle scars, and other injuries.

N.J. ADMIN. CODE 10A:31-3.12(2) (1979).

for "[a]ll newly admitted inmates . . . "[13] *Davis*, *supra*, at 398 n. 2 (citing N.J. ADMIN. CODE 10A:31-3.12(2) (1979)). Because the policy did not incorporate the reasonable suspicion requirement, it was ruled unconstitutional. *Id.* at 401.

Several other Courts in this District have since held the same. *See, e.g.*, *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610, 622 (D.N.J. 1990) (holding that a visual strip search and subsequent viewing of plaintiff urinating was not reasonable "on the basis of mere suspicion that a car in which the detainee was a passenger was stolen."); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220, 225 (D.N.J. 1990) ("The mere fact that an arrestee will be incarcerated . . . does not render a strip search reasonable. Stated somewhat

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[13] Judge Cohen opined:

> As this court sees it, a blanket policy covering only persons charged with felonies or with misdemeanors involving weapons or contraband arguably is justifiable because it is based on a reasonable generalization: that persons charged with these offenses are likely to be concealing weapons or contraband. Although such a blanket policy, by its very nature, may encompass some individual arrestees with respect to whom reasonable suspicion to search will not exist, such searches will nonetheless be upheld because the policy is deemed to be constitutionally justified. However, when an arrestee charged with a felony or a misdemeanor involving weapons or contraband is strip searched pursuant to a policy encompassing all arrestees, regardless of the nature of their offenses, and where it is conceded that no suspicion regarding the particular arrestee existed, the requisite justification for the search is lacking; neither the general policy nor its particular application is supportable.

Id.

differently, arrest itself, standing alone, is simply not enough."); *O'Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429, 434 (D.N.J. 1988) (holding that strip/body cavity searches of plaintiffs arrested for petty disorderly offenses were unconstitutional and "senseless"); *cf. Wilkes v. Borough of Clayton*, 696 F. Supp. 144, 149 (D.N.J. 1988) (holding borough's blanket policy of visual observation of arrestees using bathroom facilities "no less destructive of arrestees' rights than the visual strip searches" previously held unconstitutional).

With respect to the Circuit Courts of Appeal, eight circuits presently agree that reasonable suspicion must be present before a strip search is conducted in this context. *See Bull v. City and County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert denied*, 483 U.S. 1020 (1987); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989), *cert denied*, 493 U.S. 977 (1989); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Stewart v. County of Lubbock*, 767 F.2d 153 (5th Cir. 1985), *cert denied*, 475 U.S. 1066 (1986); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert denied*, 455 U.S. 942 (1982). This consensus is buttressed by valid concerns for privacy, dignity, and the preservation of self-worth. *See, e.g.*, *Roberts*, 239 F.3d at 110 (considering strip searches an "extreme intrusion" on personal privacy and "an offense to the dignity of the individual") (citation omitted); *Chapman v. Nichols*, 989 F.3d 393, 396 (10th Cir. 1993) ("It is axiomatic that a strip search represents a serious intrusion upon personal

rights."); *Mary Beth G.*, 723 F.2d at 1272 (7th Cir. 1983) (considering strip searches "demeaning, dehumanizing, undignified, embarrassing and repulsive"); *see also O'Brien*, 679 F. Supp. at 434 (D.N.J. 1988) (describing strip/body cavity searches of plaintiffs for disorderly offenses as humiliat[ing] and degrad[ing]"). In short, a clear consensus demonstrates that these searches are undignified and unconstitutional.

Defendants disagree and contend that "[t]he weight of current authority nationwide as to the legality of blanket strip searches in prisons has turned overwhelmingly in favor of upholding such searches." (Def.'s Burlington Reply Br. at 2.) In light of this "overwhelming" authority, Defendants contend that "*Davis* misinterpreted the Supreme Court's ruling in *Bell v. Wolfish*, and this court should not adhere to its result." (*Id.*) (internal citation omitted). Defendants are correct that a circuit split has developed, but it is an overstatement to say that "current authority" has "turned overwhelmingly".

ii. Competing Authority

There are three cases that indicate a new trend. First, the Seventh Circuit recently upheld a clothing-exchange procedure that requires inmates to disrobe in front of same-sex officers and put on jail-issued uniforms. *See Stanley v. Henson*, 337 F.3d 961, 966-67 (7th Cir. 2003).[14] Second, the Ninth Circuit's recent holding in *Bull v. City and County of S.F.*, *see supra*, can be attributed to Circuit Judge Ikuta, who

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[14] Defendants do not cite *Stanley* in their briefs, but it is relevant to the instant matter.

concurred only because he felt "compelled by Ninth Circuit case law." *See Bull*, 539 F.3d at 1202. In his concurrence, he opined that the Ninth Circuit misconstrued *Bell v. Wolfish*. *Id.* at 1202-05. Third, and most significantly, the Eleventh Circuit recently overruled its precedent that previously required reasonable suspicion for strip searches. *See generally*, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). There, the *en banc* Court held that so long as the strip search is no more intrusive than the one conducted in *Bell*, then reasonable suspicion is not required for the search of an incoming inmate, regardless of whether the underlying arrest is for a misdemeanor or a felony. *Id.* at 1314. These new cases do not present controlling authority, but neither do the cases cited from different courts sitting in this District. As a result, this Court shall examine the cases to determine whether there are new reasons to depart from *Davis*.

Beginning with *Stanley*, the plaintiff in that case was arrested for misdemeanor charges of resisting arrest and battery on a police officer. *Stanley*, 337 F.3d at 962. At the police station, she was told to remove all her clothes except her underpants, and to put on a jail-issued uniform. *Id.* This process occurred in an open, albeit small room, with an officer watching. *Id.* During the two-minute procedure, the officer did not conduct a visual inspection of the plaintiff's orifices, nor did she touch the plaintiff in any way. *Id.*

After her charges were dropped, the plaintiff in *Stanley* filed a § 1983 claim alleging the clothing-exchange procedure violated her Fourth Amendment rights. *Id.* at 962-63. Specifically, she contended that

the procedure amounted to an "intrusive strip search" performed "without regard" to her particular charge. *Id.* The Seventh Circuit began its analysis by concluding that, at minimum, a search had occurred:

> The presence of a jail officer who continuously observed Ms. Stanley as she exchanged her clothing . . . suggests that this was more than an administrative procedure for changing into a jail uniform; it implies that the officer's purpose was to watch over Ms. Stanley to ensure that nothing illicit was brought into or out of the jail.

Id. at 964. The Seventh Circuit rightfully held that "observation" is a form of search for purposes of the Fourth Amendment. *Id.* The Circuit then performed the *Bell* balancing test, ultimately concluding that the procedure did not offend the Fourth Amendment. *Stanley*, 337 F.3d at 967. The scope of the intrusion was relatively narrow in light of the "objective of preventing the smuggling of weapons or other contraband into . . . the jail population." *Id.* at 966.

Stanley demonstrates that a search procedure justified on the basis of jail security may be upheld if it is minimally intrusive and by consequence, respectful of privacy and human dignity. Such a procedure is not only consistent with the Fourth Amendment, it is also consistent with the policy concerns of jail officials. While the purpose of the search was similar to the instant case, the means to serve that purpose were decidedly less intrusive. For example, there the underpants remain on at all times, and no one is forced to undergo a supervised shower.

Next, Defendants point to the recent Ninth Circuit decision in *Bull* to lend support to their position that strip searches done without reasonable suspicion are constitutional.[15] (*See* Oral Arg. Tr. at 30-31, Nov. 10, 2008.) Even though that case held in concert with the majority of circuits opposing such searches, Defendants point to the concurring opinion of Circuit Judge Ikuta. He opined, "I concur in the majority's opinion with reluctance and grave concern. While compelled by Ninth Circuit case law, the disposition is in tension with Supreme Court precedent." *Bull*, 539 F.3d at 1202 (Ikuta, J., concurring).

In his view, Ninth Circuit jurisprudence places undue reliance on evidence of a smuggling problem when deciding the reasonableness of a strip-search procedure. This reliance, he writes, is contrary to the dictates of *Bell*. *Id.* at 1203. In *Bell*, the administrators had "proved only one instance in the [detention facility's] short history where contraband was found during a body cavity search." *Id.* (quoting *Bell*, *supra*, at 558). The Supreme Court nevertheless upheld the blanket strip search procedure, and stated that "the lack of evidence was of *little import*." *Id.* (citing *Bell*, *supra*, at 559) (emphasis added). In short, Judge Ikuta's concern was that the Ninth Circuit adopted the very standard that the Supreme Court rejected in *Bell*.

While Judge Ikuta's concurrence provides guidance with respect to the *Bell* balancing test, it does not change the fact that the Ninth Circuit struck down a strip search procedure, similar to the one here,

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[15] The strip search in that case "involved inspection of the naked body, including the arrestee's breasts, buttocks, and genitalia." *Bull*, *supra*, at 1195.

as unconstitutional. That holding lends further support to Plaintiff's claim, and does little to advance the cause of Defendants.

Defendants next cite *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).[16] Due to the heavy reliance on this case, a thorough examination is required. (*See* Oral Arg. Tr. at 21:9-12, Nov. 10, 2008.) ("I could not state better than the Eleventh Circuit . . . I believe that the Eleventh Circuit interpretation of *Bell* is exactly correct.").

Powell represents the first clear break with the holding of the majority of Circuits, effectively creating a Circuit split. The issue before the en banc Circuit was:

> whether a policy or practice of strip searching all arrestees as part of a process of booking them into a general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible.

Id. at 1300. Answering in the affirmative, the Eleventh Circuit not only overruled its own precedent, it also rejected the persuasive precedent of several circuits that distinguish misdemeanor-booking procedure from that of felony. *See id.* at 1309 (acknowledging that some circuits require reasonable suspicion to strip

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[16] The booking procedures at issue in *Powell* are somewhat similar to the ones in the present case. For example, in that case, the inmates also took a group shower while being observed by jail officials. *Powell*, 541 F.3d at 1301. The major difference is the number; whereas here, Essex County compelled showers of up to three inmates at a time, in *Powell*, up to forty inmates showered together in a large room. *Id.*

search persons charged with misdemeanor offenses, unlike felony offenses, where no level of suspicion is required). Citing a string of cases holding to that effect from the Sixth, Fifth, Ninth, and Seventh Circuits,[17] the Eleventh Circuit states bluntly – "[t]hose decisions are wrong." *Id.* at 1310.

Before fully examining the Circuit's view of the misdemeanor/felony distinction, it is important to first examine the reasoning behind the Eleventh Circuit's principle holding. The Eleventh Circuit states:

> The security needs that the Court in *Bell* found to justify strip searching an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is booked into the general population for the first time.

Powell, 541 F.3d at 1302. Thus, the Circuit based its holding in part on an analogy between an incoming inmate and an admitted inmate, after a contact visit; the former is different, it reasoned, only because his 'contact' with the outside lasted his entire pre-arrest life. *Id.* at 1313. By implication, if a contact visit for an *admitted* inmate provides an opportunity to smuggle contraband, then surely "one big and prolonged contact visit with the outside world", *see id.*, for an *incoming*

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[17] *See, e.g.*, *Masters v. Crouch*, 872 17 F.2d 1248, 1255 (6th Cir. 1989); *Stewart v. Lubbock County, Tex.*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999) (en banc); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). This District makes a similar distinction between indictable and non-indictable offenses. *See, e.g.*, *Ernst*, 739 F. Supp. at 225.

inmate provides an even a greater opportunity to smuggle contraband. Although logically sound, this argument discounts the fact that, by and large, most arrests are a surprise to the arrestee. Such a surprise does not give the arrestee an opportunity to plan a smuggling enterprise, unlike an admitted inmate who has knowledge of a forthcoming contact visit.

The Circuit also bases its holding on the contention that the officers in *Bell* did not have reasonable suspicion prior to conducting the blanket policy searches. *See Powell*, *supra*, at 1307 ("When the [Supreme] [C]ourt stated that 'these searches' do not violate the Fourth Amendment, it obviously meant the searches that were before it, and those searches were conducted under a blanket policy without reasonable suspicion."). Yet, just because the searches in *Bell* were conducted pursuant to a blanket policy does not mean that reasonable suspicion was lacking. The searches in *Bell* were conducted after contact visits with outside visitors, during which time exposure to contraband is heightened. *Cf. Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (noting that "contraband is often passed" during contact visits). These visits, by their very nature, may then provide the requisite reasonable suspicion for jail officers to justify the blanket search policy. Such searches are consistent with the reasonable blanket-risk-assessment approach discussed in *Davis* and adopted by the several circuits that distinguish between misdemeanor and felony offenses. *See Davis*, 657 F. Supp. at 400-01. The mere fact that strip searches were conducted after contact visits pursuant to a blanket policy does not, by necessity, eradicate any reasonable suspicion used to justify them. Individualized reasonable suspicion may

be lacking, but given the safety concerns of housing an admitted inmate in a detention setting, such a policy may nonetheless be constitutional if supported by the *Bell* balancing test.

One final aspect of the Eleventh Circuit's reasoning is worth noting. The Circuit disagrees with its sister circuits' interpretation of the phrase, "less than probable cause." *See id.* at 1307. It states:

> The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection.

Id. To support this conclusion, the Circuit states that the Supreme Court did not expressly require reasonable suspicion in *Bell*; it only held that strip searches could be conducted on "less than probable cause." *Id.* at 1309 (citing *Bell*, 441 U.S. at 560). The Circuit then reasons that "the absence of reasonable suspicion is also less than probable cause." *Id.* To be sure, this proposition is technically correct. In support, the Circuit cites Justice Powell's opinion in *Bell* calling for "at least some level of cause, such as reasonable suspicion . . . " *Id.* (citing *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). The Circuit subsequently concludes: "Obviously, Justice Powell would not have dissented from a holding that the Court had not made."

To begin, the conclusion that '*less than probable cause*' implicitly means '*no reasonable suspicion*' is too great of a logical leap without any more direction than

a four-line concurrence and dissent by Justice Powell. While it may be true that Justice Powell "would not have dissented from a holding that the Court had not made," other reasons for the dissent are equally plausible. For example, Justice Powell may have dissented out of protest, assuming that the Justices failed to obtain enough votes to make a positive ruling on the issue. Rather than forfeit an entire holding, the majority Court may have deemed it prudent to leave the interpretation of the phrase "less than probable cause" to the lower courts.[18] Still even more plausible, the Court may have refrained from making a positive ruling on the issue simply because the particular question of reasonable suspicion was not before the Court. *See, e.g.*, *Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (recognizing the "duty to avoid deciding constitutional questions presented unless essential to a proper disposition of a case . . . "). Speculation of this sort is justified only to show that there is more than one way to explain Justice Powell's four-line dissent. In any event, this interpretive approach rests on tenuous ground. Even the majority in *Powell* acknowledges that "it can be risky to place too much reliance on dissenting opinions . . . " *Powell*, 541 F.3d at 1308; *see also Powell*, 541 F.3d at 1314 (Edmondson, J., concurring) ("I think it is

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[18] Notably, for thirty years the Supreme Court has not found a need to readdress this issue, even in the face of eight circuits requiring reasonable suspicion to strip search incoming prisoners or detainees. *See supra*, p. 21-22 of this Opinion. While "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *see Missouri v. Jenkins*, 515 U.S. 70, 85 (1985) (emphasis added), the denial of many a writ over an extended period of time speaks, at minimum, to a lack of urgency to address these holdings.

jurisprudentially unsound to look at a Justice's dissenting opinion to determine what the Supreme Court has decided in a case.").

The only remaining issue is the misdemeanor/felony distinction. The Eleventh Circuit correctly states that the misdemeanor/felony distinction finds no basis in the *Bell* decision, as the Supreme Court in that case dealt with a blanket-policy covering all inmates at the detention facility. *Id.* Some of those inmates were held for "contempt of court", still others included "witnesses in protective custody who had not been accused of doing anything wrong". The point being that these are not persons one might ordinarily suspect of smuggling contraband. *Id.* (citing *Bell*, *supra*, at 524 & n. 3). But even if that policy made no distinction between misdemeanor and felony offenders, the persons strip searched pursuant to the policy were admitted inmates exposed to outside individuals via planned contact visits. That situation is quite different from the instant matter. Here, individuals are strip searched as they first enter the facility, without consideration of the crimes or offenses for which they are charged. For reasons already stated, *see* p. 28 of this Opinion, the situations are inapposite.

Aside from the asserted lack of foundation in case law, the Eleventh Circuit further states that the distinction has "no constitutional significance when it comes to detention facility strip searches." *Id.* As a textual matter, the Fourth Amendment affords no more protections to persons charged with misdemeanors than it does to those charged with felonies. Nevertheless, Fourth Amendment history and

jurisprudence requires a careful balancing between the instant concerns of personal privacy and administration of security. *See Bell*, *supra*, at 559. After performing this balancing test, ever mindful that the Fourth Amendment prohibits "unreasonable" searches, four circuits have concluded that a distinction between misdemeanor or non-indictable offenses and felony or indictable offenses is appropriate. *See, e.g.*, *Hartline v. Gallo*, 546 F.3d 95, 102 (2d Cir. 2008) ("[F]or more than twenty years this Court has held that a misdemeanor arrestee may not be strip searched in the absence of individualized reasonable suspicion that she is secreting contraband.") Indeed, this Court noted in its Opinion certifying the instant class that a similar distinction is recognized in this district. *Florence*, *supra*, at *16 ("*Davis* requires strip searches to be based on reasonable suspicion . . . which can be supplied by specific facts known about the arrestee *or the arrest, or the nature of the charged arrest*.") (citing *Davis*, *supra*, at 399-400) (emphasis added); *see also O'Brien*, 679 F. Supp. at 434 (holding that strip/body cavity searches of plaintiffs arrested for petty disorderly offenses were unconstitutional and "senseless"). The courts that have required individualized reasonable suspicion prior to a strip search of misdemeanor or non-indictable arrestees have done so not because the Fourth Amendment textually grants such arrestees special protection; rather, courts have done so after analyzing valid concerns of personal privacy and security, adhering all the while to the *Bell* balancing test outlined by the Supreme Court. The Eleventh Circuit disregards this fact by ruling the misdemeanor/felony distinction meaningless.

Ultimately, *Powell* is persuasive due to its novel reasoning and sheer *en banc* force. Nevertheless, this Court ultimately finds its contrarian holding less than compelling. The post-contact visit searches upheld in *Bell* are dissimilar to the post-intake searches struck down by the circuits in the thirty years since that decision. Thus, *Powell* does not present a convincing argument to depart from *Davis*.

iii. Burlington and Essex Counties

The search procedures at Burlington and Essex County jails do not pass constitutional muster under the *Bell* balancing test. Furthermore, the *Bell* progeny supports the holding that strip searches of non-indictable offenders performed without reasonable suspicion violates the Fourth Amendment (made applicable to the states through the Fourteenth Amendment). Although the scope of the particular intrusion at Burlington may be less intrusive than the one in place at Essex, both procedures involve a complete disrobing, examination of the nude inmate's body, followed by a supervised shower. With respect to place, these procedures occur in a shower room where privacy is minimal.

As for the manner in which the strip searches are conducted, both procedures take place in the presence of other inmates, which further contributes to the humiliating and degrading nature of the experience. The searches are performed pursuant to a blanket policy without distinction between indictable and non-indictable offenders. Thus, a hypothetical priest or minister arrested for allegedly skimming the Sunday collection would be subjected to the same degrading procedure as a gang-member arrested on an allegation

of drug charges. Arguments extolling the virtue of administrative efficiency in a jail setting cannot overcome this unreasonable result.

The final prong of the *Bell* balancing test concerns the facility's justification for the policy. Burlington County and Essex County both appeal to general security concerns. (*See* Def. Burlington Br. at 7 & Def. Essex Br. at 27.) While Essex attaches an expert report by George M. Camp of the Criminal Justice Institute calling for "admissions searches" for all incoming inmates, (*See* Def. Essex Ex. D.) (opining that "jails are more dangerous than prisons"), Burlington attaches reports on gang violence throughout New Jersey. (*See* Def. Ex. C.)

Burlington makes the case that the search policy is not only necessary to prevent smuggling of contraband, but also to identify gang members through body markings, tattoos, and piercings. (*See* Def. Burlington Br. at 8.) They state, "[t]he simple fact is that if a correctional facility fails to identify members of rival gangs, and house rival members in the same cell, inmates and/or staff members will be injured or die." (*Id.*) This statement references a 2004 New Jersey State Police Survey indicating statewide gang membership at 16,701 with 516 gangs. (*See* Def. Burlington Br. at 8 n. 6.) Burlington also references an exhibit showcasing new statistics from a 2007 survey of the New Jersey State Police. According to that survey, just nine out of twenty-five townships and boroughs in Burlington County reported zero gang presence. (Def. Ex. C.) These statistics lend some weight to Burlington's argument, but they are not enough to carry the day. Surely a visual observation –

which for purposes here is tantamount to a strip search and therefore highly intrusive and degrading – is not the only method available to jail officials to screen for potential gang members upon intake. Moreover, nothing in this Court's holding prohibits jail officials from ever searching non-indictable offenders, assuming they have reasonable suspicion to do so.

Burlington also appeals to health concerns in its justification of the search policy. (*See* Def. Burlington, Br. at 9.) They state, "M.R.S.A.[19] is most commonly detected by the presence of abscesses, cellulitis, boils, carbuncles, and impetigo, all of which could be missed absent a visual inspection of the inmate's entire body." *Id.* Essex does not make a similar health-related argument.

Pointedly, this Court fails to see how a private screening with a licensed medical professional cannot sufficiently alleviate Burlington's concerns with respect to the spread of M.R.S.A. or other staph infections. The fact that Defendants provide no affidavits certifying the presence of such health threats in their facility, other than citing nationwide statistics provided by the "Kaiser [sic] Foundation" in 2007, is telling.[20] (Def. Burlington Br. at 9 n. 7.) While

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[19] M.R.S.A., methicillin-resistant staphylococcus, also known as staph infection, "is a strain of staph that is resistant to the broad spectrum antibiotics currently used to treat it." (Def.'s Burlington Br., p. 9.) According to statistics from the Kaiser Foundation in 2007, out of 1.2 million hospital patients diagnosed with the infection, the rate of fatality was between four and ten percent. (*Id.* at n. 7)

[20] Defendants also rely on a case called *Gerber v. City of Burlington, et al.*, Civ. No. 95-3043. Defendants contend that the district court there upheld a search procedure similar to the one

the threat of M.R.S.A. is undoubtedly serious, the specter of staph infection alone does not, *ipso facto*, trump Fourth Amendment protections in this case.

Finally, it is worth noting that neither county submits supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities. Although the Supreme Court opined that evidence of a smuggling problem is "of little import" to the analysis, *see Bell*, 441 U.S. at 559, it did not exclude the evidence from analysis altogether. In sum, the search policies at issue fail the *Bell* balancing test. Moreover, the overwhelming weight of authority still supports the conclusion that blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, is unconstitutional. As a result, Plaintiff's motion for summary judgment on this issue is granted. Defendant's cross-motion for summary judgment is denied. The question that arises from this holding is the remedy.

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here. (Def. Br. p. 4.) For whatever reason, however, an opinion in that case does not exist. Plaintiffs' counsel certifies that the case resulted in "a summary order disposing of a defendant that resulted not on the merits but because opposition was never filed." (Pl. Opp'n Br. p.2.) Plaintiff subsequently contends that Defendants' reliance on the case is "patently false" and done in "bad faith". Plaintiff asks for an Order of Contempt, along with reasonable expenses and attorney's fees "incurred as a result of their false filing", pursuant to Federal Rule of Civil Procedure 56 (g). While Defendants' apparent reliance on a non-existent case is troublesome, this request must be denied. Defendants' submitted affidavits, (*see* Aff. of Def. Counsel, filed September 25, 2008), coupled with the statements on the record during oral argument, (*see* Oral Arg. Tr. at 40:15-25, 41:1-17, Nov. 10, 2008), sufficiently show that Defendants' reliance was not done in bad faith.

3. Preliminary Injunction

Plaintiffs seek preliminary injunctive relief on behalf of the certified class against Defendants Burlington and Essex Counties. (Pl. Br. at 22.) A preliminary injunction is appropriate when the party seeking such relief shows: (1) a reasonable probability of success on the merits; (2) irreparable harm; (3) that the non-moving party will not suffer greater harm if the injunction is granted; and (4) public interest favors the granting of the injunction. *See Child Evangelism Fellowship of New Jersey v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004). Only if all four factors favor injunctive relief will Defendant be enjoined from the alleged conduct. *See New Jersey Hosp. Ass'n. v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995).

Here, Plaintiffs contend that there is a "strong probability" of success on the merits in this case. Given the holding of this District, coupled with the holdings from eight Circuit Courts of Appeal, *see supra*, this contention is valid. Irreparable harm, however, is another matter. A party moving for injunctive relief has the burden of demonstrating irreparable harm. *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). The oft-cited standard for irreparable harm is a "clear showing of immediate irreparable injury". *See Continental Group, Inc., v. Amoco Chemicals Corp.*, 614 F.2d 351 (3d. Cir. 1980). Irreparable harm is met when "a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be adequately compensated." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-485 (3d Cir. 2000) (emphasis added).

In *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610 (D.N.J. 1990), this District denied injunctive relief for a plaintiff in a strip search context, where that plaintiff "failed to show any likelihood that she is likely to be subjected to strip searches in the future . . . " *Id.* at 624 (citing *City of L.A. v. Lyons*, 461 U.S. 95 (1983)). Here, too, Plaintiffs have failed to show any risk that they are likely to be subjected to strip searches in the future. Even if a "§ 1983 plaintiff's allegation that he has suffered from unconstitutional practices may be sufficient to establish standing to sue for damages, '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.' " *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495 (1979)). Because this likelihood has not been shown, Plaintiffs' motion for injunctive relief must be denied for lack of standing. Because Plaintiffs fail in this regard, the remaining factors of the test need not be addressed.

4. Eleventh Amendment Immunity

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. This Amendment bars suits by private parties against a state, *see Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (recognizing that a state or Congress may waive such immunity via statute), even when a state is charged with a § 1983 violation. *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

As for state entities other than the state itself, it is well settled that "counties, municipalities and political subdivisions are not protected by the Eleventh Amendment." *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Some entities may be entitled to immunity, however, if deemed an arm of the state. *Febres*, 445 F.3d at 229. The test to determine whether an entity is an arm of the state and therefore entitled to Eleventh Amendment immunity is three-fold: (1) whether payment of a judgment resulting from the suit would come from the state treasury, (2) the status of the entity under state law, and (3) the entity's degree of autonomy. *See Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001) (citing *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (en banc)). The Third Circuit has repeatedly held that the most important factor is whether the payment of a judgment would come from the state treasury. *Chisolm, supra*, at 323 (citing *Carter v. City of Phila.*, 181 F.3d 339, 348 (3d Cir. 1999)). Significantly, because Eleventh Amendment immunity is an affirmative defense, the burden of proving applicability is on the party asserting it. *See Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999).

Defendants Board of Chosen Freeholders of Burlington County, Warden Cole in his official capacity, and Burlington Jail contend they are entitled to Eleventh Amendment immunity. (Def. Br. at 11-12.) Defendants rely on New Jersey case law that purports to recognize counties as arms of the state. *See, e.g.*, *State v. Rush*, 46 N.J. 399, 414 (1966) (noting that counties meet the costs of prosecutions and are

considered subdivisions of the state); and *Bergen County v. Port of N.Y. Auth.*, 32 N.J. 303, 312 (1960) ("[H]istorically the county was solely a subdivision of the State constituted to administer state power and authority."). These decisions supply some evidence of the status of counties under New Jersey law, but they do not address the precise issue as to whether the Board of Chosen Freeholders, Warden Cole in his official capacity, and Burlington Jail are entitled to Eleventh Amendment immunity. In fact, Defendants advance no argument as to the third prong of the *Fitchik* test other than the citations to these cases.

The first and most important factor in the *Fitchik* analysis is whether payment from a judgment will be satisfied by the state treasury. If a judgment against any of the three Burlington Defendants is to be paid from the state treasury, then the state essentially becomes a party in interest to the litigation. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). This fact – if true – cuts in favor of granting immunity to Defendants. Yet, once again Defendants submit no evidence to show that liabilities from a potential judgment will be paid by the state treasury. The record is silent. Plaintiffs, on the other hand, underscore that Burlington County maintains ten million dollars in general liability insurance pursuant to Policy No. MDB 0266755. (Lask Certif. Ex. D, *filed* 9/22/2008). The fact that a state entity is self-insured cuts against the finding of Eleventh Amendment immunity. *See Fitchik*, 873 F.2d at 661 (3d Cir. 1989). Defendants parry this argument in their reply brief, choosing instead to rely on a recent unpublished decision in this District that does not address the self-insured issue. *See Haddad v. Flynn*,

2008 WL 4224921 (D.N.J. Sept. 9, 2008). Given this response, the first and most important factor in the analysis does not favor the granting of immunity.

The *Fitchik* autonomy prong remains. Defendants cite to N.J. ADMIN. CODE 10A:31-8.5 to demonstrate a lack of autonomy. (Def.'s Burlington Br. at 13.) Defendants state that this regulation, promulgated by the State Department of Corrections ("DOC"), governs the conduct inside the Burlington Jail. (*Id.*) The inference is that each Burlington Defendant is duty-bound to adhere to the regulation. To be sure, DOC has authority "over all county and city jails or places of detention." (*Id.*) But that does not complete the inquiry. Another portion of Title 10 provides that "each [jail] facility shall develop and implement a comprehensive written plan governing searches of facilities and inmates." N.J. ADMIN. CODE 10A:31-8.2(b). This suggests a degree of autonomy whereby a jail facility, like Burlington, could implement its own plan for intake procedures. As Warden Cole in his official capacity represents the Jail, he too shares this degree of autonomy. In fact, it appears both entities have fulfilled this task with noble intentions. According to Section 1186, *see supra*, of the Policies and Procedures of the Burlington Jail, "[i]n the absence of reasonable suspicion or other permitting circumstances, inmates committed on non-indictable charges shall not be strip searched." (Pl. Ex. L.) Regardless of the fact that all inmates were subjected to what they called a "visual observation", this policy guide demonstrates the autonomy that Defendants Burlington Jail and Warden Cole enjoyed.

With respect to the Board of Chosen Freeholders, this governing body enjoys considerable autonomy consistent with the strong tradition of home rule in New Jersey. *See* N.J. STAT. ANN. 40:20-1.2 ("The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its structure and to alter or abolish its agencies."). For example, the Board of Chosen Freeholders is "empowered to make policy and management decisions", *see* N.J. STAT. ANN. 40:20-1.4, including the power to adopt its own "administrative code". *See* N.J. STAT. ANN. 40:20-1.3(a).

These findings aside, Defendants' arguments and factual averments are too scant to support a finding of Eleventh Amendment immunity. Defendants have not carried their burden. As a result, this Court cannot support an application of Eleventh Amendment immunity to the Board of Chosen Freeholders, Warden Cole in his official capacity, or Burlington Jail. Based on the present record before it, such a finding, if warranted, is premature.[21] Defendants' claim is therefore denied without prejudice.

5. Qualified Immunity

The doctrine of qualified immunity provides that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus,

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[21] Defendants may wish to supplement the record and raise this issue at a later date. *See Blake v. Kline*, 612 F.2d 718, 726 (3d Cir. 1979).

the threshold question must be: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If a constitutional violation exists, then the next question must be whether that right was clearly established at the time of the violation. *Id.* The general touchstone is whether the conduct of the official was reasonable at the time it occurred. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Finally, because qualified immunity is an affirmative defense, the burden of proving its applicability rests with the defendant. *See Beers-Capital v. Whetzel*, 256 F.3d 120, 142, n.15 (3d Cir. 2001).

Here, Warden Cole in his individual capacity is not entitled to qualified immunity. As discussed above, *see* Part III.B.2.iii of this Opinion, a constitutional violation is clearly present. The "visual observations" of all incoming inmates charged with non-indictable offenses, performed without reasonable suspicion, violates the Fourth Amendment. Even incoming inmates have the right to be free from unreasonable searches.

The next question, then, is whether the right violated by Warden Cole in his individual capacity was clearly established at the time the searches took place – i.e. from March 3, 2003 to March 20, 2008. This Court stated in its Opinion certifying class – "*Davis* is an Opinion of this Court and is therefore the law within this district." *Florence*, *supra*, at *16. In accordance with that statement, *Davis* has been the law within this district for nearly twenty-two years. *See generally Davis v. City of Camden*, 657 F. Supp.

396 (1987). Additional decisions by other courts in this district have supported and relied on that holding. *See, e.g., Diloreto v. Borough of Oaklyn*, 744 F. Supp. 610 (D.N.J. 1990); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220 (D.N.J. 1990); *O'Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429 (1988); *Roderique v. Kovac*, 1987 WL 17058 (D.N.J. September 14, 1987). The fact that the Third Circuit has not ruled on the present issue does not somehow lessen the binding effect of these judgments. Therefore, some level of suspicion has been required to strip search non-indictable or minor offenders since 1987. Given that Warden Cole has worked at the Burlington County Jail since 1976, serving as its Warden since 1997, it strains credulity that he was not aware of the fact that the policy in place at Burlington Jail was unconstitutional. Thus, "if the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Defendant nonetheless contends that the search policy was objectively reasonable because it was implemented pursuant to a state regulation. Specifically, Defendants maintain that the searches were conducted pursuant to N.J. ADMIN. CODE 10A:31-8.5. That statute reads in relevant part:

> (b) Strip Searches may be conducted in any of the following circumstances:
>
> 1. Prior to admitting a person lawfully confined to an adult county correctional facility, prison or jail by court order or pursuant to an arrest authorized by law;

2. Before an inmate enters the facility after being permitted to leave for any reason;

3. Whenever there is reasonable suspicion that an inmate is carrying contraband;

4. Before placement of an inmate into:
   i. Prehearing Detention;
   ii. Disciplinary Detention;
   iii. Protective Custody.

5. Before placement of an inmate under a psychological observation or suicide watch;

6. Whenever the person admitted for a minor offense(s) is known to have a history of violent or assaultive conduct or a previous conviction(s) for a crime(s); and

7. After a contact visit.

Id. According to Defendant, the searches performed at the Burlington Jail were conducted pursuant to Section 1 of that Code. (Def. Burlington Br. at 14.) This section facially permits the strip searches of newly admitted persons, thereby lending support to Defendant's argument. Reading further though, Section (b)(3) permits strip searches when "reasonable suspicion" of contraband is present. Additionally, Section (b)(6) permits strip searches of persons admitted on the basis of "minor offenses" who have a criminal history. Recognizing that the broadly-phrased Section (b)(1) counter-intuitively swallows these sections of the statute, Sections (b)(3) and (b)(6) still call for individual discretion rather than the blanket policy implemented here. There mere fact that there is ambiguity or inconsistency in this regulation does not

change the fact that the law on this issue was clearly established on this issue as of 1987.

Furthermore, there is great similarity between Section (b)(1) of the present Code, and the portion of the Code held unconstitutional in *Davis*. *See Davis*, *supra*, at 398 n. 2 ("All newly admitted inmates shall be thoroughly searched. Each newly admitted inmate shall be strip searched for weapons and contraband.") (quoting N.J. ADMIN. CODE 10A:31-3.12(2) (1979)). Such similarity between these broadly phrased sections ought to have put Warden Cole on notice that the policy implemented at Burlington Jail was unconstitutional.

Defendant cites the recent case of, *Smart v. Taylor*, 2008 WL 755904 (D.N.J. March 19, 2008), to support his contention for qualified immunity. In that case, the Court found a constitutional violation when the plaintiff was strip searched immediately before a court hearing, and then immediately after the same hearing. *Id.* at *5. Despite the violation, the Warden and the C.C.C.F. Officer who conducted the search were entitled to qualified immunity because the search was conducted pursuant N.J. ADMIN. CODE 10A:31-8.5. *Id.* at *6. The Court stated, "This regulation on its face does not appear to violate the Fourth Amendment." *Id.* Even though this is the same general regulation upon which Defendant in this case relies, the defendants in that case relied on a different section. Moreover, the facts are inapposite to the present case. As a result, Defendant finds no refuge in *Smart v. Taylor*. Defendant Warden Cole is not entitled to qualified immunity. The claim is denied.

6. Arrest Claim

Finally, Defendant Essex generally claims that "the arrest claim was invalid." (Def.'s Essex Br. at 35.) Essex states that "the plaintiff has provided no evidence that there was a custom or policy of making improper arrests by the Essex County Sheriff's Office or the County of Essex. Without such factual contentions any claim against the County of Essex must be dismissed." (*Id.*) Defendants do not cite a particular Federal Rule of Civil Procedure to advance this claim, although they style it as a motion to dismiss. Thus, it is evident that Defendant seeks dismissal on Count 5 of Plaintiff's First Amendment Complaint. There, Plaintiffs allege "§ 1983 Municipality Custom Violations." (Am. Compl., ¶¶80-88.) Plaintiffs' Opposition Brief contains no response to this claim by Essex.

When analyzing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true Plaintiffs' factual allegations in the complaint. *See Phillips v. County of Alleghany*, 515 F.3d 224, 233 (3d Cir. 2008). Any inferences from the factual allegations are considered in the light most favorable to the Plaintiff. *Id.* It is not required that the plaintiff plead evidence. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). The plaintiff is required, however, to plead "enough facts to state a claim that is plausible on its face." *Bell Atlantic Corp.v. Twombly*, 550 U.S. 544, —, 127 S. Ct. 1955, 1974 (2007).

Here, the relevant allegations from Plaintiffs' First Amended Complaint state:

81. Defendants Burlington County Jail, Burlington County Board of Chosen Freeholders, Essex County Correctional Facility and Essex County Sherriff's Department and Warden Juel Cole maintained a municipal policy or custom of detaining persons without promptly verifying if a proper warrant for arrest existed nor promptly doing anything to insure a person's liberty is not impeded by being falsely arrested.

82. Those practices of the Defendants, who are government entities, are so permanent and well settled as to constitute a custom or usage with the force of law.

84. Defendants had contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances.

85. Defendants failed to train, discipline or control its personnel . . .

86. Defendants actions or inactions communicates a message of approval to the offending subordinate Defendants John Does 1-8.

88. Defendants failure to provide adequate training and supervision to its police officers and employees constitutes a willful and wanton indifference and deliberate disregard for human life and the rights of private citizens, including Plaintiff.

(Am. Compl. ¶¶ 81-88.)

Although Defendant is correct that Plaintiff has "provided no evidence" that it was the policy or custom of Essex to engage in the alleged wrongful conduct, evidence is not required at this time. *See Bogosian*, 561 F.2d at 434. Indeed, "complaints alleging municipal liability under § 1983" are not subject to heightened pleading standards. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, et al.*, 507 U.S. 163, 168 (1983) (contrasting pleading requirements for allegations of municipal liability under § 1983 with that of "fraud or mistake"). The factual allegations cited above sufficiently comply with the pleading requirements of the Federal Rules. *See* Fed. R. Civ. P. 8(a). Therefore, Defendants' motion to dismiss is denied. Plaintiffs have pleaded sufficient facts to advance their claim.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is granted, and Defendants' cross-motion for summary judgment is denied. Plaintiffs' request for preliminary injunctive relief is denied. Defendants Board of Chosen Freeholders of Burlington County, Warden Cole in his official capacity, and Burlington County Jail did not sustain their burden on a claim for Eleventh Amendment immunity. Therefore, this claim is denied without prejudice. Warden Cole's claim for qualified immunity in his individual capacity is denied. Finally, Defendant's motion to dismiss the arrest claim is denied. Plaintiffs have pleaded sufficient facts to withstand Defendant's challenge. It is so ordered.

Joseph H. Rodriguez
U.S.D.J.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

N.J. Stat. § 2A:161A-1

A person who has been detained or arrested for commission of an offense other than a crime shall not be subjected to a strip search unless:

a. The search is authorized by a warrant or consent;

b. The search is based on probable cause that a weapon, controlled dangerous substance, as defined by the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al., or evidence of a crime will be found and a recognized exception to the warrant requirement exists; or

c. The person is lawfully confined in a municipal detention facility or an adult county correctional facility and the search is based on a reasonable suspicion that a weapon, controlled dangerous substance, as defined by the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al., or contraband, as defined by the Department of Corrections, will be found, and the search is authorized pursuant to regulations promulgated by the Commissioner of the Department of Corrections.

N.J. Stat. § 2A:161A-2

A person who has been detained or arrested for commission of an offense other than a crime shall not be subjected to a body cavity search unless:

a. The search is authorized by a warrant or consent; or

b. The person is lawfully confined in an adult county correctional facility and the search is based on a reasonable suspicion that a weapon, controlled dangerous substance, as defined by the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al., or contraband, as defined by the Commissioner of the Department of Corrections, will be found, and the search is authorized pursuant to the regulations promulgated by the Commissioner of the Department of Corrections.

N.J. Stat. § 2A:161A-3

a. For purposes of this act, a "strip search" means the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts. The term does not include any removal or rearrangement of clothing reasonably required to render medical treatment or assistance or the removal of articles of outer-clothing such as coats, ties, belts or shoelaces.

b. For purposes of this act, a "body cavity search" means the visual inspection or manual search of a person's anal or vaginal cavity.

N.J. Stat. § 2A:161A-4

a. Any strip search or body cavity search conducted under this act shall be performed by persons of the same sex as the arrested person and at a location where the search cannot be observed by persons not physically conducting the search. The law enforcement officer or other person authorized to conduct a strip search or body cavity search shall obtain permission of the officer in charge of the station house to conduct the search and shall report the reason for the search on the record of arrest. Where emergency conditions require immediate action to prevent bodily harm to the officer or others, the requirements of this section shall not apply. In all cases where a strip search is conducted as an exception to the requirements of this section, the officer conducting the search shall file a separate written report setting forth the emergency conditions which required the immediate action. This written report shall be filed with and reviewed by the officer in charge who had the authority to authorize a strip search.

b. Reports required pursuant to this section shall not be deemed public records within the meaning of P.L.1963, c. 73 (C. 47:1A-1 et seq.) but, upon request, shall be made available to the person searched, the county prosecutor, the

Attorney General or the Commissioner of the Department of Corrections.

c. Nothing in this section is intended to preclude lawful use of the report of a strip search or body cavity search by law enforcement officials, the county prosecutor or officials responsible for the administration of a county or State correctional facility.

APPENDIX F

ADMINISTRATIVE CODE PROVISIONS

N.J. Admin. Code § 10A:31-1.3 (2010)

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise: . . .

"Crime" means an indictable offense or equivalent in another state. . . .

"Offense other than a crime" means a non-indictable offense or equivalent in another state. . . .

N.J. Admin. Code § 10A:31-8.4 (2005)

Strip search of a person(s) who has been detained or arrested for commission of an offense other than a crime

(a) A person who has been detained or arrested for commission of an offense other than a crime and who is confined in an adult county correctional facility shall not be subject to a strip search unless there is reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found.

(b) Strip searches shall be conducted:

1. By a person of the same sex;

2. At a location where the search cannot be observed by unauthorized persons;

3. By the number of custody staff deemed reasonably necessary to provide security;

4. Under sanitary conditions; and

5. In a professional and dignified manner.

(c) The person authorized to conduct a strip search shall file a written report to be made part of the detained or arrested person's record which shall include, but not be limited to, the following information:

1. A statement of facts indicating reasonable suspicion for the search;

2. The name of the custody staff member in charge who authorized the search;

3. The name(s) of the custody staff present during the search and the reason for custody staff presence;

4. The name(s) of the person(s) conducting the search; and

5. An inventory of the item(s) found during the search.

(d) Reports required pursuant to this section shall not be deemed public records, but, upon request, shall be made available to:

1. The Commissioner, New Jersey Department of Corrections;

2. The adult county correctional facility Administrator;

3. The Attorney General;
4. The county prosecutor; and/or
5. The person searched.

N.J. Admin. Code § 10A:31-8.5 (2005)

(a) The person authorized to conduct a strip search on a person lawfully confined in an adult county correctional facility shall obtain the permission of the supervisor on duty to conduct the search and shall file a written report explaining the reasons for the search.

(b) Strip searches may be conducted in any of the following circumstances:

1. Prior to admitting a person lawfully confined to an adult county correctional facility, prison or jail by court order or pursuant to an arrest authorized by law;
2. Before an inmate enters the facility after being permitted to leave for any reason;
3. Whenever there is reasonable suspicion that an inmate is carrying contraband;
4. Before placement of an inmate into:
   i. Prehearing Detention;
   ii. Disciplinary Detention; or
   iii. Protective Custody.
5. Before placement of an inmate under a psychological observation or suicide watch;

6. Whenever the person admitted for a minor offense(s) is known to have a history of violent or assaultive conduct or a previous conviction(s) for a crime(s); and

7. After a contact visit.

(c) A strip search shall include a check for:

1. Body vermin;

2. Cuts;

3. Bruises;

4. Needle scars; and

5. Other injuries, where appropriate.

(d) A strip search shall be conducted:

1. At a location where the search cannot be observed by unauthorized persons;

2. By custody staff of the same sex as the inmate except as set forth in (e) below; and

3. By the number of custody staff deemed reasonably necessary to provide security.

(e) Strip searches may be conducted by persons of the opposite sex under emergency conditions as ordered by the adult county correctional facility Administrator.

(f) No inmate shall be searched as punishment or discipline.

N.J. Admin. Code § 10A:31-8.6 (2005)

(a) The person who has been detained or arrested for the commission of an offense other than a

crime and who is lawfully confined in an adult county correctional facility shall not be subject to a body cavity search unless the custody staff member in charge determines that the search is based on a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found.

(b) An authorized body cavity search of a person who has been detained or arrested for commission of an offense other than a crime shall be conducted:

1. Under sanitary conditions;
2. At a location where the search cannot be observed by unauthorized persons;
3. By a physician or a registered nurse who must be of the same sex as the detained or arrested person;
4. In the presence of only those custody staff members deemed necessary for security, who are of the same sex as the detained or arrested person; and
5. In a professional and dignified manner, with maximum courtesy and respect for the person.

(c) The person who has been detained or arrested for the commission of an offense other than a crime may:

1. Remove the object in the presence of the physician or registered nurse and a custody staff member(s) of the same sex as the person; or

2. Be examined by the physician or registered nurse who may remove the object, without the use of force.

(d) In the event it is determined that a foreign object which contains metal is present in the body cavity of the person who has been detained or arrested for the commission of an offense other than a crime, such object may be removed only by the physician with or without the use of force.

(e) In the event the custody staff member in charge or the physician or the registered nurse has determined that nonmetal contraband is being concealed in the body cavity of the person who has been detained or arrested for the commission of an offense other than a crime, and that person refuses to permit contraband removal, the person may be placed in medical isolation. During medical isolation, that person may be kept under visual surveillance to detect removal or elimination of the contraband.

(f) The person authorized to conduct a body cavity search shall file a written report to be made part of the detained or arrested person's record which shall include, but not be limited to, the following information:

1. A statement of facts indicating reasonable suspicion for the search;

2. The name of the custody staff member in charge who authorized the search;

3. The name(s) of the custody staff member(s) present during the search and the reason for his or her presence;

4. The name(s) of the person(s) conducting the search;

5. An inventory of any item(s) found during the search; and

6. The reason for use of force, if necessary.

(g) Reports required pursuant to this section shall not be deemed public records, but, upon request, shall be made available to:

1. The Commissioner, New Jersey Department of Corrections;

2. The adult county correctional facility Administrator;

3. The Attorney General;

4. The county prosecutor; and/or

5. The person searched.

APPENDIX G

BURLINGTON COUNTY JAIL
POLICIES AND PROCEDURES

TITLE: B.C.D.C. - BOOKING OFFICER (S)
NO: SECTION: 1277

EFFECTIVE DATE: JANUARY 1, 2004
REVISED: April 15, 2007
APPROVED BY: JUEL E. COLE, JAIL ADMINISTRATOR/WARDEN

Policy:

As necessary to ensure the efficient and proper handling of the body, person, property and all related documents at the time of in-processing for all inmates and their release from custody, a minimum of two correction officers will be assigned in the booking department of the Burlington county detention facility at all times.

General information/instructions:

The three assigned Correction officer positions are identified as Booking #1, Booking #2 and Booking #3; however duties are often shared and found overlapping.

Booking officers are responsible to ensure the proper handling of all inmates, their body and property at

time of all admissions and releases occurring on his duty shift and that all paperwork relative to this mission is properly completed. The booking officer is also held responsible for the custody and security of all inmate property, inmate property lockers, the property room and the issue and receipt of all jail uniforms. Due to the nature of duties involving the strip search of inmates, it is required that this officer be the same sex of the inmates being searched in the booking department of the Burlington County Detention Facility.

For understanding; the booking officer is responsible to ensure the proper handling of all committing paperwork, legal documents, and all jail forms relative to an intake or release occurring of his/her duty shift. The booking officer is also held responsible to ensure the proper handling of all other paperwork handled or processed in ID., all courts, inmate returns from court, and that an inmate's admission or release from custody is the booking department.

No admission or release can be made without the authorization of the Chief of I.D., booking supervisor, or an on-duty shift supervisor. Whenever the Chief of I.D. is present, the Chief of I.D. will be the responsible supervisor of all admissions, releases, and all other functions and/or operations of the booking department in coordination with the facility's on- duty shift commander and supervisors whom the booking officers are assigned. In the absence of the Chief of I.D., the booking officers shall report directly to the booking sergeant, or on-duty shift commander and supervisors.

Every booking officer shall be responsible to ensure the continued operations of the booking department, shall expedite all duties and responsibilities in a timely, proficient manner and avoid any unnecessary delay in the handling, processing of new commits and releases. Whenever necessary, when handling multiple Commits and releases, the booking officers shall assist each other, share duties and responsibilities as required. Ultimately, the handling signature on J.D. forms will be determined as the responsible staff member if any question should arise. All forms relative to a procedure require the handling officer's signature.

Procedure:

All booking officers will perform the minimal basic procedures outlined below. Additionally, booking officers will follow all other established procedures for ID. as currently published which this policy shall supplement.

A. Intake

1. The correctional supervisor will be responsible to conduct a screening insuring that the prisoner observed does not have any medical and/or psychological problems. If the prisoner's medical/psychological the prisoner shall not be accepted until the proper medical/psychological clearance can be obtained from the nurse. If the incoming inmate appears to be in fairly good health and does not appear in distress, the supervisor will accept the inmate, complete the attached intake screening form in its entirely and make it part of the ID. Package.

The screening form will then be turned over to the nurse.

a. Supervisor must authorize the admission.

2. Once an admission is authorized, booking officer(s) will immediately proceed in the removal of the prisoner's restraints and the initial in-take processing of an inmate into the care and custody of the Burlington County Detention Facility. The booking officer will assign the next available identification file number to the inmate being incarcerated here for the first time or obtain the inmate's previous identification file number from records, computer, etc.

1. [sic] Upon review and determination of charges by a supervisor, shift supervisor must authorize the type of search to be conducted.

a. Authorizing supervisor must complete the strip search authorization form.

1) In the absence of reasonable suspicion or other permitting circumstances, inmates committed on non-indictable charges shall not be stripped searched.

b. All incoming inmates will be kwelled in the following manner:

1) New commits will be visually checked for scars, marks, and tattoos.

2) New commits who enter the facility with indictable charges and they fall under the search procedures in

accordance to N.J.S. A 10A:31-8 will be stripped searched.

3) All commits will be Kwelled and the Booking Officers will ensure the inmate applies the kwell to all areas on the body except the eyes.

4) Inmate shall be instructed to lather the lotion and allow ten (10) minutes for treatment to work.

5) After ten (10) minutes, the inmate shall be instructed to take a shower with warm soapy water.

6) Any inmate who refuses or is not kwelled will be placed in pre-hearing detention and disciplinary charges will be filed.

7) Booking officers will advise and seek replacement supply of kwell lotion when necessary to ensue continued kwell operations.

5. The booking officer will ensure that the following jail forms be legibly and properly completed for each new commit.

a. Body search sheet must be completed by the booking officer who actually performed the body search or made visual observation of the inmate's body. Any distinguishing scars, cuts, or body markings, old and new, or deformities observed that would contribute to the inmate's individual identity and provide documentation of an

injury or illness must be noted anatomically on the body search sheet. It is not sufficient that only fresh marks be recorded. The officer, date, and the name of inmate indicated must sign the body search sheet. All tattoos and Gang affiliated marks, scars and tattoos will be noted. (See section 1186, policy and procedures for search of inmates.)

b. Inmate intake record; booking officer will complete this record by recording pertinent information obtained from the inmate criminal charge sheets and/or detainee from other jurisdictions.

c. Inmate intake record (personal history); the booking officer shall ask the inmate all questions regarding his personal history in a professional manner.

d. Inmate money or store card, the booking officer will make an accurate count of all money (actual cash) in the possession of the inmate at time of intake processing and property complete an inmate money card for each inmate. A money card must also be completed if the inmate has no money. Whatever the amount, zero, ten cents or ten dollars, all money found in the inmate's possession will be counted in the presence of the inmate. The inmate will then acknowledge/verify the amount by signing his own signature on the reverse of the card. The processing officer will also sign his/her signature in verification.

1) Immediately upon counting all inmate money and completing the money card and ensure that all monies are checked with the counterfeit pen. The handling booking officer will have the other booking officer/or supervisor verify the inmate money amount in cash and on the money card. Verifying staff member will initial after the handling booking officer's signature and seal the envelope.

2) All inmate money received at time of intake processing will be immediately transported and deposited in administrative control.

3) In the event of delay due to the processing and handling of multiple new commits, all inmate money will be temporarily secured in a locked security money box maintained in the booking department.

4) The most senior booking officer will be responsible to secure the money box key and to use it as necessary to temporarily secure inmate money. A record shall be kept of all money deposited in and out of the money box. The money box key will be turned over to the other booking officer when he goes on his break. He also shall turn the keys over to the relieving senior officer on the next oncoming shift.

e. Visit card; the booking officer will offer and have each inmate properly complete a visit card at time of intake. The inmate will be allowed to list five (5) adults (name and address) from whom he would receive visits while incarcerated. The inmate is permitted to take it with him in the event he wishes to fill it out on a later date and turn it into the Visiting department.

f. Resident ID. Card: the booking officer shall be responsible to obtain ill. Photos of the inmate (face front and right side view).

g. Inmate property inventory sheet: the booking officer will be responsible to properly and thoroughly complete an inventory sheet listing all personal property removed from the inmate.

   1) A brief description shall be given of all property items regarding, color brand, other identifying information. For jewelry items, the officer will be responsible to identify its metal by only referencing as "yellow" in color for that which "appears" to be gold or "white" in color when it "appears" to be silver. Credit cards and bank cards should be listed by name and the last four (4) digits of the card with the expiration date.

h. Fingerprint; all first-time commits, sentenced commits and sex offenders must be finger printed on live scan.

6. Booking officer will remove all restraints from the inmate and shall be responsible to return all such restraining equipment back to the committing law enforcement officer(s).

7. Immediately upon removal of all restraints, booking officer shall proceed all in – processing procedures as outlined above and issue to the inmate uniform and jail supply items. All inmates shall be provided with a copy of the facility's rules & regulations which shall be verbally explained by a staff member to inmates who are illiterate, not sufficiently conversant with the English language, or otherwise unable to read or understand due to a physical/medical inability.

a. Inmate will then be escorted over to the clinic's holding unit for further processing procedures of the medical department.

b. Control # 1 – count officer will be notified of the inmate's name, ID. number and assigned housing in medical holds (a-200).

B. Uniform and laundry bag supply and distribution

The booking officer (s) will be responsible to distribute and maintain an accounting of all inmate uniforms and laundry bags issued.

1. Booking officer will issue to each newly committed inmate two (2) orange inmate uniforms that are properly sized for the individual inmate. No preference will be given to inmates who request the larger over-sized uniforms, thus diminish the jail's availability of the large uniforms in supply.

2. Booking officer will also issue to each newly committed inmate one (1) jail laundry bag.

3. The booking officers must inspect each uniform being issued, ensure no damage nor marking are present before issue.

4. Daily linen room inventory. An inventory will be performed on each Shift and maintained daily of all inmate uniforms starting with a formal counting of all clean uniforms available for issue, the number of uniforms issued out, etc. The booking officers will be responsible for all uniforms and supplies, to keep its safeguard, and record the removal of any items taken from the linen room.

1. [sic] Transfers to C-wing: the uniforms assigned to the inmate being transferred will be placed into the inmate's property storage in booking until release.

2. Transfers to disciplinary detention: the uniform assigned to the inmate being transferred will be secured into the inmate's detention storage locker until release. If returning to population, inmate will have his same uniforms.

3. Transfers to C.W.R.C.: the uniform issued to the inmate being transferred which the inmate is not wearing will be turned into the laundry supply and properly indicated in all jail property records. The inmate will be allowed to wear the one uniform over to C.W.R.C. where he will be changed over, given a C.W.R.C.

uniform, and the uniform taken off at C.W.R.C. will be bagged and returned to B.C.D.C.

C. Releases:

1. Immediately upon receiving notice of bail preparation or scheduled release, Data Control Clerks will notify Center Control to have the inmate escorted to booking and contact booking to inform them an officer is needed for a release that is being escorted from the housing area.

2. Booking officer will instruct the inmate to place all jail issued items on the counter for inspection and accounting. Booking officer will ensure that all jail issue items are being returned; towel, cup, spoon, etc. In addition, that no other unauthorized jail items are being removed from the facility. The booking officers are required to complete and sign the "jail issued items release form" for all inmates being released.

3. Any item that is not returned or is destroyed will result in its' replacement cost charged to the inmate money account prior to release. The replacement cost is listed on the items issued release form. The completed form shall be filed in the inmate's identification folder.

4. Booking officer will be responsible to pull the inmate's property from locker storage and reissue to the inmate for change over.

   a. For inmate releases known in advance, i.e., state prison shipments, etc., 11-7 shift booking officers will be responsible to pun

the inmate property bags out of the lockers and have available by 0700 hours.

5. No inmate will be released without authorization from a supervisor. Booking officer will ensure supervisor's authorization and signature before releasing.

6. Booking officer will escort inmates being released to the Intake Release Cells, and place inmate's property in the Release Property closet until the inmate is signed out by a supervisor.

E. Courts

1. The 3 cells adjacent to Cr.#5 are to be used for all outgoing and incoming courts.

2. All courts who exits the secured perimeter of the facility will be stripped search upon their return.

3. Once the search has been conducted the inmate shall be placed in the holding tank in front of Center Control to enable SA Officers to escort the inmates back to their perspective housing units. The booking 3 officer can also assist in escorting inmates back to their housing unit. All booking officers are responsible to follow established policies not in conflict with any of the terms and condition of this policy.

All booking officers are responsible to follow established policies not in conflict with any of the terms and conditions of this policy.

APPENDIX H

BURLINGTON COUNTY DETENTION CENTER/CORRECTIONS & WORK RELEASE CENTER POLICIES AND PROCEDURES: SEARCH OF INMATES – SECTION 1186

EFFECTIVE DATE: JANUARY 1, 2004
APPROVED BY: JUEL E. COLE, JAIL ADMINISTRATOR/WARDEN

POLICY:

AS NECESSARY TO ENSURE THE HEALTH, SAFETY AND WELFARE OF ALL INMATES AND FOR THE PURPOSE OF CONTROLLING AND DETERRING THE INTRODUCTION AND CONCEALMENT OF CONTRABAND, THE FOLLOWING POLICIES AND PROCEDURES WILL BE FOLLOWED AS REQUIRED BY N.J.A.C 10A:31-8.1 THRU 8.9.

DEFINITIONS:

PAT SEARCH: A PHYSICAL SEARCH OF AN INMATE WHILE CLOTHED CONSISTING OF A ROUTINE AND SYSTEMATIC PAT-DOWN BY THE OFFICER'S HANDS TO FEEL FOR CONTRABAND THAT MAY BE CONCEALED ON THE INMATE'S PERSON.

BODY OR STRIP SEARCH: A PHYSICAL SEARCH OF AN INMATE BY THE SAME SEX OFFICER

WHILE UNCLOTHED CONSISTING OF ROUTINE AND SYSTEMATIC VISUAL OBSERVATION OF THE INMATE'S PHYSICAL BODY TO LOOK FOR DISTINGUISHED IDENTIFYING MARKS, SCARS OR DEFORMITIES, SIGNS OF ILLNESS, INJURY OR DISEASE AND/OR THE CONCEALMENT OF CONTRABAND ON THE INMATE'S BODY.

BODY CAVITY SEARCH: A PHYSICAL SEARCH OF AN INMATE'S SP[E]CIF[I]CALLY DEFINED BODY CAVITY WHEN IT IS KNOWN OR REASONABLE SUSPECT THAT THE INMATE MAY BE CONCEALING CONTRABAND WITHIN THE PRIVATE ORIFICE OR CAVITY OF THE INMATE. THIS SEARCH MAY ONLY BE PERFORMED BY A LICENSED MEDICAL PROFESSIONAL; PHYSICIAN OR REGISTERED NURSE.

PROCEDURES:

A. ALL INMATES ADMITTED TO BCDF/CWRC SHALL BE THOROUGHLY SEARCHED.

B. ALL SEARCHES SHALL BE CONDUCTED UNDER SANITARY CONDITIONS, IN A PROFESSIONAL AND DIGNIFIED MANNER WITH MAXIUM COURTESY AND RESPECT FOR THE INMATE'S PERSON.

C. NO INMATES SHALL BE SEARCHED AS PUNISHMENT OR DISCIPLINE.

D. ALL SEARCHES WITH THE EXCEPTION OF ROUTINE PAT-DOWN SEARCHES, WILL BE DOCUMENTED BY A WRITTEN REPORT.

E. STRIP-SEARCH OF A PERSON WHO HAS BEEN DETAINED OR ARREST[ED] FOR COMMISSION OF AN OFFENSE OTHER THAN A CRIME:

1. A PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR COMMISSION OF AN OFFENSE OTHER THAN A CRIME AND WHO IS CONFINED IN AN ADULT CORRECTIONAL FACILITY SHALL NOT BE SUBJECT TO A STRIP-SEARCH UNLESS THERE IS A REASONABLE SUSPICION THAT A WEAPON, CONTROLLED DANGEROUS SUBSTANCE OR CONTRABAND WILL BE FOUND.

2. STRIP SEARCHES SHALL BE CONDUCTED:

   a. BY A PERSON OF THE SAME SEX
   b. IN PRIVATE
   c. UNDER SANITARY CONDITIONS
   d. IN A PROFESSIONAL AND DIGNIFIED MANNER

3. THE PERSON AUTHORIZED TO CONDUCT THE STRIP-SEARCH SHALL FILE A WRITTEN REPORT TO BE MADE A PART OF THE DETAINED OR ARRESTED PERSON'S RECORD. THE REPORT SHALL

INCLUDE BUT NOT TO BE LIMITED TO THE FOLLOWING INFORMATION: (SEE STRIP SEARCH AUTHORIZATION FORM.)

a. A STATEMENT OF FACTS INDICATING REASONABLE SUSPICION FOR THE SEARCH
b. THE NAME OF THE SUPERVISOR WHO AUTHORIZED THE SEARCH
c. THE NAME OF THE CORRECTION OFFICER PRESENT DURING THE SEARCH AND THE REASON FOR HIS/HER PRESENCE
d. THE NAME OF THE PERSON(S) CONDUCTING THE SEARCH
e. AN INVENTORY OF THE ITEM(S) FOUND DURING THE SEARCH. (SEE BODY CHECK SHEET, PHYSICAL DIAGRAM)
f. ALL NOTATIONS, NAMES OR SIGNATURES WILL BE NEATLY WRITTEN IN A MANNER THAT IS READABLE BY OTHERS. OFFICER'S INITIALS WILL NOT BE ACCEPTABLE

F. STRIP-SEARCH OF A PERSON LAWFULLY CONFINED IN AN ADULT COUNTY CORRECTIONAL FACILITY (BCDF/CWRC).

1. THE PERSON AUTHORIZED TO CONDUCT A STRIP SEARCH ON A PERSON LAWFULLY CONFINED IN AN ADULT COUNTY FACILITY SHALL OBTAIN PERMISSION TO CONDUCT THE SEARCH

FROM THE ON-DUTY SUPERVISOR AND SHALL FILE A WRITTEN REPORT EXPLAINING THE REASONS FOR THE SEARCH. CIRCUMSTANCES UNDER WHICH A STRIP-SEARCH MAY BE CONDUCTED ARE:

a. PRIOR TO ADMITTING A PERSON LAWFULLY CONFINED TO AN ADULT COUNTY CORRECTIONAL FACILITY, PRISON OR JAIL BY COURT ORDER OR PURSUANT TO AN ARREST AUTHORIZED BY LAW
b. BEFORE AN INMATE ENTERS THE FACILITY AFTER BEING PERMITTED TO LEAVE FOR ANY REASON
c. WHENEVER THERE IS REASONABLE SUSPICION THAT AN INMATE IS CARRYING CONTRABAND
d. BEFORE PLACEMENT OF AN INMATE IN PRE-HEARING DETENTION, DISCIPLINARY DETENTION OR PROTECTIVE CUSTODY
e. BEFORE PLACEMENT OF AN INMATE IN PSYCHOLOGICAL OBSERVATION OR SUICIDE WATCH
f. WHENEVER THE PERSON ADMITTED FOR A MINOR OFFENSE(S) IS KNOWN TO HAVE A HISTORY OF VIOLENT OR ASSULTIVE CONUCT OR A PREVIOUS CONVICTION FOR A CRIME; AND
g. AFTER A CONTACT VISIT

2. A STRIP-SEARCH SHALL INCLUDE A CHECK FOR:

   a. BODY VERMIN
   b. CUTS
   c. BRUISES
   d. NEEDLE SCARS
   e. TATTOOS
   f. DEFORMITIES
   g. OTHER INJURIES

3. A STRIP-SEARCH SHALL BE CONDUCTED IN PRIVATE AT A LOCATION WHERE THE SEARCH CANNOT BE OBSERVED BY PERSONS NOT CONDUCTING THE SEARCH. NO MEMBER OF THE OPPOSITE SEX SHALL BE PRESENT DURING THE SEARCH, EXCEPT AS SET FORTH BELOW:

4. STRIP-SEARCHES MAY BE CONDUCTE BY PERSONS OF THE OPPOSITE SEX UNDER EMERGENT CONDITIONS, AS ORDERED BY THE ADULT COUNTY CORRECTIONAL FACILITY ADMINISTRATOR.

5. NO INMATE SHALL BE SEARCHED FOR THE PURPOSE OF PUNISHMENT OR DISCIPLINE.

G. BODY CAVITY SEARCH OF A PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR COMMISSION OF AN OFFENSE OTHER THAN A CRIME:

1. THE PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR THE COMMISSION OF AN OFFENSE OTHER THAN A CRIME AND WHO IS LAWFULLY CONFINED IN AN ADULT COUNT[Y] CORRECTIONAL FACILITY (BCDF/CWRC) SHALL NOT BE SUBJECT TO A BODY CAVITY SEARCH UNLESS THE OFFICER IN CHARGE DETERMINES THAT THE SEARCH IS BASED ON REASONABLE SUSPICION THAT A WEAPON, CONTROLLED DANGEROUS SUBSTANCE OR CONTRABAND WILL BE FOUND.

2. AN AUTHORIZED BODY CAVITY SEARCH OF A PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR COMMISSION OF AN OFFENSE OTHER THAN A CRIME SHALL BE CONDUCTED

   a. UNDER SANITARY CONDITIONS
   b. AT A LOCATION WHERE THE SEARCH CANNOT BE OBSERVED BY UNAUTHORIZED PERSONS
   c. BY A PHYSICIAN OR A REGISTERED NURSE WHO MUST BE THE SAME SEX AS THE DETAINED OR ARRESTED PERSON
   d. IN THE PRESENCE OF ONLY THOSE CORRECTION OFFICERS DEEMED NECESSARY FOR SECURITY, AND WHO ARE THE SAME SEX AS THE DETAINED OR ARRESTED PERSON; AND

e. IN A PROFESSIONAL AND DIGNIFIED MANNER, WITH MAXIUM COURTESY AND RESPECT FOR THE PERSON.

3. THE PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR THE COMISSION OF AN OFFENSE OTHER THAN A CRIME MAY:

   a. REMOVE THE OBJECT IN THE PRESENCE OF THE PHYSICIAN OR REGISTERED NURSE AND A CORRECTION OFFICER(S) OF THE SAME SEX; OR
   b. BE EXAMINED BY THE PHYSICIAN OR REGISTERED NURSE THAT MAY REMOVE THE OBJECT WITHOUT THE USE OF FORCE.

4. IN THE EVENT IT IS DETERMINED THAT A FOREIGN OBJECT WHICH CONTAINS METAL IS PRESENT IN THE BODY CAVITY OF THE PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR THE COMMISSION OF AN OFFENSE OTHER THAN A CRIME, SUCH OBJECT MAY BE REMOVED ONLY BY THE PHYSICIAN WITH OR WITHOUT THE USE OF FORCE.

5. IN THE EVENT THE SUPERVISOR OR THE PHYSICIAN OR REGISTERED NURSE HAS DETERMINED THAT NON-METAL CONTRABAND IS BEING CONCEALED IN THE BODY CAVITY OF THE PERSON WHO HAS BEEN DETAINED OR ARRESTED FOR

THE COMMISSION OF AN OFFENSE OTHER THAN A CRIME, AND THAT PERSON REFUSED TO PERMIT CONTRABAND REMOVAL, THE INMATE MAY BE PLACED IN MEDICAL ISOLATION WHERE HE/SHE WILL BE KEPT UNDER VISUAL SURVEILLANCE TO DETECT REMOVAL OR ELIMINATION OF THE CONTRABAND.

6. THE PERSON AUTHORIZED TO CONDUCT A BODY CAVITY SEARCH SHALL FILE A WRITTEN REPORT, WHICH SHALL BE MADE PART OF THE DETAINED OR ARRESTED PERSON'S RECORD. THE REPORT SHALL INCLUDE, BUT NOT BE LIMITED TO THE FOLLOWING INFORMATION:

   a. A STATEMENT OF THE FACTS INDICATING REASONABLE SUSPICION FOR THE SEARCH THE NAME OF THE SUPERVISOR WHO AUTHORIZED THE SEARCH
   b. THE NAME(S) OF THE CORRECTION OFFICER(S) PRESENT DURING THE SEARCH AND THE REASON FOR HIS/HER PRESENCE
   c. THE NAME(S) OF THE PERSON CONDUCTING THE SEARCH
   d. AN INVENTORY OF ANY ITEM(S) FOUND DURING THE SEARCH, AND
   e. THE REASON FOR USE OF FORCE, IF NECESSARY

H. BODY CAVITY SEARCH OF AN INMATE LAWFULLY CONFINED IN AN ADULT COUNTY CORRECTIONAL FACILITY (BCDF/CWRC):

1. UNDER NO CIRCUMSTANCES MAY A BODY CAVITY SEARCH BE CONDUCTED ON AN INMATE LAWFULLY CONFINED IN AN ADULT COUNTY CORRECTIONAL FACILITY UNLESS THE SUPERVISOR IS SATISFIED THAT A REASONABLE SUSPICION EXISTS THAT CONTRABAND WILL BE FOUND IN THE INMATE'S BODY CAVITY.

2. IN THE EVENT THE SUPERVISOR IS RESONABLY SATISFIED THAT CONTRABAND IS BEING CONCEALED IN THE INMATE'S BODY CAVITY, THE INMATE SHALL IMMEDIATELY BE ESCORTED TO THE MEDICAL DEPARTMENT WHERE THE FOLLOWING PROCEDURES SHALL BE FOLLOWED FOR EXAMINATION OF THE INMATE AND REMOVAL OF CONTRABAND.

3. A BODY CAVITY SEARCH SHALL BE CONDUCTED:

   a. UNDER SANITARY CONDITIONS
   b. AT A LOCATION WHERE THE SEARCH CANNOT BE OBSERVED BY UNAUTHORIZED PERSONS

c. BY A PHYSICIAN OR REGISTERED NURSE OF EITHER SEX
d. IN THE PRESENCE OF ONLY THOSE CORRECTION OFFICERS DEEMED NECESSARY FOR SECURITY, AND WHO ARE OF THE SAME SEX AS THE INMATE, AND
e. IN A PROFESSIONAL AND DIGNIFIED MANNER, WITH MAXIMUM COURTESY AND RESPECT FOR THE PERSON

4. THE INMATE MAY:

a. REMOVE THE OBJECT IN THE PRESENCES OF THE PHYSICIAN OR REGISTERED NURSE AND A CORRECTION OFFICER(S) OF THE SAME SEX; OR
b. BE EXAMINED BY THE PHYSICIAN OR REGISTERED NURSE THAT MAY REMOVE THE OBJECT WITHOUT THE USE OF FORCE

5. IF THE SUPERVISOR DETERMINES THERE IS REASONABLE SUSPICION TO BELIEVE THAT A FOREIGN OBJECT WHICH CONTAINS METAL IS PRESENT IN THE INMATE'S BODY CAVITY, SUCH OBJECT MAY BE REMOVED ONLY BY THE PHYSICIAN WITH OR WITHOUT THE USE OF FORCE.

6. IN THE EVENT THE SUPERVISOR, PHYSCIAN OR REGISTERED NURSE HAS

DETERMINED THAT NON-METAL CONTRABAND IS BEING CONCEALED IN THE INMATE'S BODY CAVITY, AND THE INMATE REFUSES TO PERMIT CONTRABAND REMOVAL, THE INMATE SHALL RECEIVE THE APPROPRIATE DISCIPLINARY CHARGE AND MAY BE PLACED IN PRE-HE[AR]ING DETENTION OR MEDICAL ISOLATION. WHILE IN PRE-HEARING DETENTION, MEDICAL ISOLATION OR DISCIPLINARY DETENTION, THE INMATE MAY BE KEPT UNDER VISUAL SURVEILLANCE TO DETECT REMOVAL OR ELIMINATION OF THE CONTRABAND.

I. BODY CAVITY SEARCH REPORT:

A WRITTEN REPORT OF THE RESULTS OF A BODY CAVITY SEARCH SHALL BE MADE PART OF THE INMATE'S RECORD AND SHALL INCLUDE, BUT NOT BE LIMITED TO THE FOLLOWING INFORMATION:

1. A STATEMENT OF FACTS INDICATING REASONABLE SUSPICION FOR THE SEARCH
2. THE NAME OF THE SUPERVISOR WHO AUTHORIZED THE SEARCH
3. THE NAME(S) OF THE CORRECTION OFFICER(S) PRESENT DURING THE SEARCH AND THE REASON FOR HIS/HER PRESENCE

4. THE NAME(S) OF THE PERSON(S) CONDUCTING THE SEARCH
5. AN INVENTORY OF ANY ITEMS FOUND DURING THE SEARCH; AND
6. THE REASON FOR USE OF FORCE, IF NECESSARY

APPENDIX I

ESSEX COUNTY DEPARTMENT OF PUBLIC SAFETY GENERAL ORDER NO. 89-17

Effective Date: SEPTEMBER 27, 2002

This Order Consists of the following numbered sections:

I PURPOSE

II DEFINITIONS

III APPLICABILITY

IV POLICY

V PROCEDURES

VI RESPONSIBILITY FOR COMPLIANCE

VII EFFECT OF THIS ORDER

I PURPOSE

The purpose of this Order is to establish a standardized method of receiving and discharging

inmates at the Essex County Jail Annex. This Order will standardize the procedures used by each shift when processing inmates.

II DEFINITIONS

As used in this Order, the following definitions shall apply:

RECEPTION OFFICER:

The officer assigned to the Reception Department shall be responsible for controlling and restricting inmate movement and for strip searching each inmate and all his/her personal property.

RECEPTION SERGEANT:

The superior officer assigned to the Reception Department shall be responsible for collecting and reviewing the inmate's commitment papers to determine that the inmate is eligible to serve time in the Essex County Jail Annex, assigning a preliminary classification, and for collecting and safeguarding the inmate's personal property.

CLOTHING OFFICER:

The officer assigned to the clothing room shall be responsible for exchanging the inmate's street clothing for Jail Annex uniforms and the proper storage and safeguarding of the inmate's street clothing until it is returned to the inmate upon his/her release.

CLASSIFICATION:

The officer assigned to Classification shall be responsible for the assignment of inmates to housing according to their special needs (i.e. medical, sex, bail status, crime, etc.).

III APPLICABILITY

To Essex County Jail Annex personnel involved n the management and operation of the Reception Department.

IV POLICY

A. All inmates entering the Essex County Jail Annex shall be processed by personnel assigned to the Reception Department.

B. All inmates on entering the Jail Annex shall be classified and assigned to housing according to their special needs (i.e. medical, sex, bail status, crime, etc.).

C. All inmates being released from the Jail Annex (i.e. court, bail, parole, expiration of term, etc.) shall be processed out by personnel assigned to the Reception and Clothing Departments.

V PROCEDURES

All Essex County Jail Annex personnel assigned to the Reception Department shall utilize the following procedures. By using these procedures each shift will become part of a unit and each inmate will receive the same treatment on entering and leaving this institution.

A. ARRIVING INMATES:

The Reception Sergeant shall receive newly committed inmates along with their property and commitment papers. The inmate(s) will then be placed in the custody of the officers assigned to the Reception Department. These officers shall:

1. Receive the inmates, their property and commitment papers upon arrival at the Jail Annex. Before accepting the inmates the Reception Sergeant will review the commitment and/or dockets to determine that each new inmate properly belongs at the Jail Annex.

2. Place the inmate in the reception area where the inmate shall be strip searched, his personal property searched, valuables inventoried and placed in a valuable envelope which the inmate will countersign with the officer (the valuable envelope is to be sealed with a special tape that would permanently damage the original envelope when opened – the inmate's signature is to be over the tape).

   The inmate's commitment papers and/or dockets will be placed in the custody of the Reception Sergeant.

3. After the strip-search (described in Section V, paragraph B) the inmate will be required to take a shower.

4. Issue each inmate an Inmate Handbook along with two (2) sheets, one (1) blanket, one (1) cup, one (1) spoon, one (1) hygiene kit, one (1) pillow, one (1) pillowcase, two (2) towels, and two (2) uniforms. The inmate will sign a clothing receipt acknowledging that he/she received these items. The officer will explain to each inmate that **TO PROCESS OUT OF THE JAIL ANNEX EACH ITEM ISSUED ON ENTRY MUST BE ACCOUNTED FOR.**

B. STRIP SEARCHING OF INMATES:

The Reception Officer will require the inmate to empty his/her pockets and turn them inside out. The Reception Officer will have the inmate undress completely. The Reception Officer must observe carefully while the inmate undresses. The Reception Officer shall:

1. Order the inmate to open his/her mouth and remove all dentures. The interior of the mouth shall be examined carefully, paying close attention to the areas under the tongue and between the teeth and gums.

2. Examine the ears, nose, hair, and scalp. Have the inmate run his/her fingers through his/her hair so as to dislodge anything that might be concealed there.

3. Inspect the prisoner's fingers, hands, arms, and armpits.

4. Inspect all body openings, the inner thighs, and the soles of the feet and between the toes.

5. Inspect removable bandages, surgical aids, and prosthetic devices. **NOTE: REMOVAL SHALL TAKE PLACE UNDER MEDICAL SUPERVISION.**

6. Search all clothing paying close attention to hatbands, linings, pockets, collars, lapels, seams and trouser cuffs.

7. Use a flashlight to examine the interior of shoes and sneakers. With a gloved hand carefully probe the heels, soles, toecaps, tongue and walls of the inmate's shoes or sneakers.

8. Open all wallets, papers, letters, cigarette packs, etc., for contraband.

9. Body cavity searches shall take place when legally authorized by a search warrant or consent that probable cause exists. Body cavity searches may only be conducted by a licensed physician or registered nurse of the same sex as the inmate, in a medically acceptable manner and environment, and under sanitary conditions.

    a. The Commander or Internal Affairs Supervisor who has a body cavity search conducted must report the reason for this search. The report must include:

1. A statement of facts indicating reasonable suspicion or probable cause for the search.

2. Copies of the search warrant, if appropriate.

3. A copy of the consent form, if appropriate.

4. The name of the officer in charge who authorized the search.

5. The names of the persons conducting the search.

6. An inventory of any items found during the search.

b. The Commander in charge shall assure that a consent to a body cavity search is in writing whenever possible.

c. The Commander in charge shall assure that a body cavity search is conducted in private and that the search cannot be observed by persons not physically conducting the search.

d. When a body cavity search is conducted, the Commander shall request a sworn statement from the licensed physician or registered nurse who conducted the search stating that the body cavity search was conducted pursuant to statutory and medical requirements.

e. All reports pertaining to body cavity searches are not public records. These reports shall be made available upon request, only to the person searched the County Prosecutor, the Attorney General, or the Commissioner of the Department of Corrections.

f. The Commander shall log all body cavity searches in the Inmate Body Cavity Search Log.

VI RESPONSIBILITY FOR COMPLIANCE

All Jail Annex personnel are responsible for compliance with this Order. Command and Supervisory Officers shall ensure that this Order is brought to the attention of subordinates and is understood and complied with by all concerned.

VII EFFECT OF THIS ORDER

This Order is supplemental to any established Orders, Policies, or Memorandums. However, all Orders, Policies, or Memorandums, which are in conflict with this Order, are hereby superseded.

DISTRIBUTION:
ALL COMMAND AND SUPERVISORY PERSONNEL
MEDICAL DEPARTMENT

BY ORDER OF
MARK STABINSKI
WARDEN

APPROVED BY:
DANA C. HOBSON, DIRECTOR

APPENDIX J

ESSEX COUNTY CORRECTIONS PRISONER INTAKE/DISCHARGE POLICIES, EFFECTIVE 2007

Policy Title: Prisoner Intake/Discharge
Enabling Authority: N.J.A.C. 10A:31-1 et. seq.
Effective Date: February 1, 2007
Revised: June 2008
Authority: N.J.A.C. 10A:31-21.1 – 21.8
N.C.C.H.C. J-E-03
Promulgating Office: Bureau of Training and Professional Development Policy and Planning Unit
Professional Association Standard Cited:
Applicability: All Personnel
Review Schedule: June 2009

Any Order, Policy, Directive or Memoranda in conflict with this Order are hereby superseded.

Reviewed and Approved By: Associate Warden
[signature] 7/8/09
Issued By: Warden
[signature] 7/8/09
Authorized By: Director
[signature] 7/8/08 [sic]

I. PURPOSE

This Policy Statement establishes procedural guidelines for the management of prisoner

admissions to and discharges from the correctional facility.

II. POLICY

It shall be the policy of the Department of Corrections to accept all persons lawfully committed to the custody of the Department of Corrections; however, persons with evident medical or psychiatric problems, including intoxication, must be accompanied by current documentation signed by a physician, declaring such persons suitable for admission to the Essex County Correctional Facility.

Further, all persons presented for admission to the Essex County Correctional Facility shall be accompanied by a proper commitment document, signed by a Judge, Magistrate, or a Municipal Court Administrator, which shall include a bail. In addition, the Department of Corrections reserves the right to limit the amount of personal property to be accepted, for safekeeping, with persons presented for admission to the correctional facility. Bulk properly shall be deemed unacceptable and shall remain in the custody of the arresting authority.

Discharges, releases and transfers from Department of Corrections custody will occur only with valid and legal documentation from the Courts or receiving agencies, and upon completion of proper criminal history checks and identification protocols.

III. DEFINITIONS

The following words and terms, which used in this directive, shall have the following meanings unless the context clearly indicates otherwise:

Body Orifice Scanning System (B.O.S.S. Chair): A non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities.

Commitment: Any person lawfully presented to the Department of Corrections for detention.

Commitment Papers: A warrant or formal authorization to hold an inmate for prosecution or detention by a Federal, State or local law enforcement agency or the U.S. Department of Homeland Security.

Detainers: Legal and valid law enforcement or Court documents which may hold and detain a defendant and may include but not be limited to:

1. Municipal charges for which there has been no legal action to date.
2. Adjudicated criminal charges for which sentence has been imposed.
3. Criminal charges resulting from indictment for which there is no final disposition (open charges).
4. Warrants for violation of parole or probation.
5. Immigration Detainers.

Discharges: The lawful and legal release of the defendant to the community, municipal police department, Sheriff's Office or other local State or Federal jurisdiction upon presentation of legal and valid transfer documents or receipt of requisite bail or Court Order.

Management Information Systems (MIS) Admission/Discharge Manual: The document describes the step-by-step process to enter all admissions, movements and discharges into the County Correctional Information System (CCIS) and through the electronic interface into the DSI System.

Victim Notification Form The document completed by the victim requesting notification of a defendant's release or change-of-status and received from the municipal police department at the time of admission to the Essex County Correctional Facility.

IV. PROCEDURES

These procedures are divided into six (6) broad categories including:

1. Security and Control
2. Intake Reception
   a. Pre-booking
   b. Sheriff's Office Identification Process
   c. Return from Sheriff's Office
3. Admission/Booking Process

4. Records and Classification
5. Center County Control
6. Discharge Process

1. Security and Control

a) General:

The Intake Control Officer shall monitor and maintain surveillance and security of the Intake Yard and the Intake Reception Area; and, with proper authorization, control access to and egress from the Intake Reception Area.

Upon the arrival of law enforcement officers at Intake Control, the Intake Control Officer shall ascertain the nature of the visit and so advise the appropriate law enforcement agency, i.e., Department of Corrections (DOC), Essex County Sheriff's Department (ECSD), or Newark Police Department (NPD), etc.

Further, the Intake Control Officer shall direct visiting law enforcement officers as to where to park their vehicles to secure their weapons, and when it is appropriate to remove prisoners from their vehicles.

Meanwhile, the Intake Control Officer will obtain verbal authorization, from the agency to be visited, to permit the visiting law

enforcement officers and their prisoners to enter the facility.

With the appropriate authorization, the Intake Control Officer shall then direct the visiting law enforcement officers and their prisoners to enter the facility.

Equally, as law enforcement officers seek to exit the facility, with or without prisoners, the Intake Control Officer will obtain verbal authorization, to include the number of prisoners, where applicable, from the visiting agency, as well as ensuring that the Intake Yard is secure, prior to granting egress.

Where prisoners are being brought out of the facility, the Intake Control Officer shall ensure that all prisoners have been secured in the police vehicle, prior to allowing law enforcement officers to retrieve their weapons.

b) Intake Reception Security Officer:

The Intake Reception Security Officer shall:

1) Maintain communication with the Intake Reception Officer;
2) Preserve the security of the Intake Reception area;
3) Search and secure prisoner holding cells both before and after each usage;

4) Meet arriving law enforcement officers and their prisoners at the Entrance Sallyport and direct them to appropriate staging/holding facilities;

5) Direct the law enforcement officer to uncuff his/her prisoners, one at a time, and to produce that prisoners commitment papers and personal property;

6) Pat-frisk the prisoner and direct the law enforcement officer to present the prisoner, commitment document(s) and the prisoner's personal property to the Intake Reception Officer;

7) Secure and monitor prisoners in holding cells to await the Sheriff's I.D. process and or transfer to Booking; and

8) Transfer prisoners, commitment documents and personal properly to the Booking area.

c) Booking Area Security Officer:

The Booking Area Security Officer shall:

1) Maintain communication with the Booking Officer;

2) Preserve the security of the Booking area;

3) Search and secure inmate waiting/holding areas before and after each usage;

4) Supervise inmate activities;

5) Conduct a thorough search of individual inmates;

6) Ensure that all newly admitted inmates receive an intake shower and use Rid shampoo to prevent the spread of communicable diseases. Newly admitted inmates shall shower in an inconspicuous area with an obstructed view;

7) Observe and document, in writing, any evidence of:

   a. Notable body markings such as "tattoos;"

   b. Body vermin or disease;

   c. Open sores, visible wounds, scars, injuries, casts, braces, prosthesis or other devices; and

   d. Advises Classification and or Medical Departments of such observations.

8) Newly admitted inmates may be subjected to a strip search or body cavity search only in accordance with the conditions set forth in N.J.A.C. 10A:31-8.

2. Intake Reception

a) Pre-booking Process:

The Intake Pre-booking Officer shall maintain an open line of communication with the Intake Control Officer toward facilitating the flow of law enforcement and

prisoner traffic into and out of the facility and to preserve the integrity of overall security.

Once alerted by the Intake Control Officer, to the presence of law enforcement with arrestees for presentation at the facility, the Intake Pre-booking Officer shall ensure that Intake Security Officers are available to receive the law enforcement officers and their prisoners, before authorizing the Intake Control Officer to allow access into the facility.

Upon presentation, at Intake Reception, of a prisoner for admission the correctional facility, the Intake Pre-booking Officer shall:

1) Direct the prisoner(s) to remove any metal objects he/she has in his/her possession and pass through the metal detector. If the alarm sounds, the officers shall ask the prisoner if any additional metal objects were not removed, if so, have the objects removed and have the prisoner pass through the metal detector again. If the alarm sounds again, the prisoner shall be returned to the arresting authority for remedial action.
2) After successfully clearing the walk through metal detector, the officer shall direct the prisoner to the B.O.S.S. chair for further screening. The prisoner being screened should first place their chin on

or near the upper surface of the oral sensor. After the prisoner's mouth is scanned he or she shall be directed to sit in the chair. The correct seating position is with the base of the back against the backrest. When the prisoner sits in the chair their lower cavity(s) and rear stomach regions are non-intrusively scanned by very low intensity magnetic fields and their mouth is scanned in a similar manner. A prisoner's feet can be scanned one at a time. The foot must be placed firmly on the rubber strip with the toes positioned against the backstop. The foot must then be slid back down the strip in a backward direction. When metal is detected, visual and audible alarms are activated. An alarm activates when a person carrying a concealed metal object moves within range of the detection field. The alarm remains continuously activated until the object is moved out of the field. When an alarm is activated the appropriate LED flashes and an audible tone is generated. If the chair alarm goes off, and inquiry must be addressed to the inmate to ascertain if the prisoner has any medical metal limbs (pins, limbs, staples, etc.). If the prisoner states he or she does, the prisoner shall be secured in a holding area, and a supervisor notified along with the Medical Department. If the prisoner states he/she does not then the prisoner shall be secured in a holding

area and a supervisor shall be notified for further investigation.

3) Carefully review the commitment document(s) for validity and completeness;

4) Verify that the Victim Notification Form is received with the commitment documents (when required by Statute), and is legible and completed in its entirety.

5) Ensure the inmate's medical records and medical transfer summaries are available for medical review for all intra-system transfer prisoners, then forward to main Medical for screening and review.

6) If the commitment documents and Victim Notification Form is not available or incomplete, the defendant will not be admitted, and will be returned to the officers from the municipality or jurisdiction of arrest.

7) Direct the prisoner to state his/her name and age.

8) Ascertain whether the prisoner knows his/her charge(s) and bail information; if not, advise the prisoner of same.

9) Be observant of each prisoner for visible signs, symptoms or complaints of:

   a. Any bleeding;

   b. Any shortness of breath;

   c. Any significant pain (chest pain, abdominal pain, or other pain);

d. Any burns;

e. Any eye injuries;

f. Any seizures; or

g. If, in the officer's opinion, a prisoner has a medical problem that warrants immediate medical attention (i.e., any of the above signs, symptoms or complaints), a medical officer shall be summoned to provide an immediate medical assessment of the prisoner and to determine whether the prisoner is fit for admission to the correctional facility, or if the prisoner should be immediately referred to an outside medical facility for further evaluation and or treatment, or returned to the custody of the arresting agency. The medical officer's decision shall be binding!

10) Verify and reconcile the prisoner's personal property, in his or her presence, with the arresting authority. NOTE: the D.O.C. will not accept bulk property.

11) Enter the defendant's name, date of birth, etc. into the DSI Pre-booking system.

12) Refer the defendant to the Essex County Sheriff's Department with commitment documents for identification/photo I.D. and wristbands, and enter referral transaction into DSI Pre-booking System.

13) Add defendants to the Essex County Correctional Facility's Pre-booking county.

14) Maintain Pre-booking County.

b) Sheriff's Officer (ECSD) Identification Processing:

1) The Essex County Sheriff's Department will fingerprint, via live scan, and search their defendant database to determine any prior commitments.

2) The Essex County Sheriff's Department will determine the defendant's true identity, via New Jersey State Police, and provide the defendant's unique State Bureau of identification number (SBI number).

3) The Essex County Sheriff's Department will photo the defendant, enter it into their photo I.D. System and produce the photo I.D. number for this commitment.

4) The Essex County Sheriff's Department will generate the wristband, which will include the name, photo, photo I.D., SBI number and appropriate bar code.

5) The defendant will then be returned to the Essex County Correction Facility Pre-booking area with appropriate charging/admission documents.

c) Return from Sheriff's Department to Pre-booking Office:

Upon receipt of the defendant and commitment documents from the Sheriff's I.D. Office, the Intake Pre-booking Officer will do the following:

1) Enter defendant's return entry into the DSI Pre-booking System.
2) Verify SBI number, Photo I.D. number, and photo on the wristband with inmate in person. If an error is identified, the officer is to refer the defendant bank to the Essex County Sheriff's Department for a valid Photo I.D. number and/or a correct photo.
3) Create a CCIS Record, entering the critical I.D. data (i.e., name, Photo I.D., SBI number, date of birth) and admission date, etc. into the CCIS System (refer to Admission/Discharge Manual).
4) Verify critical I.D. data (i.e., name, date of birth, SBI number, Photo I.D., etc.) both in CCIS AND DSI System and on the wristband with inmate in person. Identify and screen-scrape problems, and if any exist, report these to the MIS Custody Liaison.
5) Interview defendant and continue the admissions/booking process including charges, detainers, warrants, bails, etc. Complete Part "A" of the CCIS Prisoner Reception and Evaluation Report.

6) Transfer defendant from the Pre-booking area and move to the Intake area and the CCIS Count.

7) Delete defendant from DSI Pre-booking System and Pre-booking Count. NOTE: Second Chance cases and Weekenders are processed in pre-booking and the CCIS, but released to a "Second Chance" housing location.

2. Admissions/Booking Process

a) Booking Officer

Upon receipt of the defendant and commitment documents into the Booking Area, the Booking Officer will do the following:

1) Enter defendants on CCIS Intake Count.

2) Verify inmate's SBI number, Photo I.D. number and photo I.D. number on the wristband with the inmate in person and with both the CCIS and DSI Systems respectively. If an error is identified, the officer is to refer the defendant back to the Essex County Sheriff's Department for a valid photo I.D. number and/or a correct photo.

3) Receive all commitment documents for newly admitted inmates from Pre-booking. Verify their correctness on the CCIS.

4) Review the commitment document(s) for each inmate and the Inmate Management System and DSI System respectively.

5) Ascertain that all charges and identifiers have been properly documented in the CCIS Inmate Management System record and the DSI System respectively.

6) Interview the inmate and complete "Part B" of the Prisoner Reception Evaluation and Booking Report on the CCIS System.

7) Complete the inmate's record in the Inmate Management System; and confirm data.

8) Ensure that the inmate is accounted for in the facility county and is scraped into DSI. Refer all screen-scraping errors to the MIS Custody Liaison.

9) Maintain the Intake facility count.

b) Intake Property Officer:

The Intake Property Officer shall:

1) In the presence of the inmate, inventory:
   a) Search all inmate property upon receipt
   b) The inmate's personal property and enter into the DSI System
   c) The inmate's clothing and enter into the DSI System
   d) The inmate's currency and enter into the DSI System

2) Provide the inmate with receipts for all property and money being held for safekeeping.

3) Safeguard all inmate property until it has been reconciled and deposited with the Inmate Property Custodian.

4) Turn over any medications confiscated from inmates to the medical officer on duty.

5) Issue each newly admitted inmate the following items:

   a) Underwear

   b) An inmate uniform

   c) A pair of inmate footwear

   d) Inmate/Disciplinary Handbook

   e) "Care" package

6) Have the inmate to sign an acknowledgement for the receipt and conditions of the issued items.

7) Document the inmate's property transactions in the DSI Management System.

8) Officers shall search all inmate property in property bags prior to issuing to prisoners.

c) Referral for Medical Evaluation

Upon completion of the collection and recording of personal property and resources, the defendant will shower shall shower in an

inconspicuous area with an obstructed view, receive institutional clothing and referral to the Medical Department for a nurse intake assessment. Following the nursing assessment, a complete history and physical examination is done.

Upon completion of the medical review, the offender will be placed in quarantine pending review of the defendant's record by the Classification Office and assignment of the appropriate custody level.

d) Entry on Order-To-Produce (OTP) List

Those defendants who are to be seen the following Court day must be entered into the automated "OTP" List. These cases include C.J.P., Non-Support and Enforcement Court.

e) All C.J.P. Admission Packages received from the Municipal Police Department for C.J.P. Inmates must be kept in a secure area pending transport to the Essex County Courts Building.

4) Records and Classification

The Classification Officer shall:

a) Take custody of all commitment documents for each newly admitted inmate.

b) Establish a "Classification Records" file for each newly admitted inmate.

c) Ensure that each newly admitted inmate receives a Medical Intake Screen, prior to leaving the Intake area.

d) Ensure that each newly admitted inmate views the Essex County Correction Facility's "Inmate Orientation Video" or receives alternate Inmate Orientation Information, as appropriate, and receives a copy of the Essex County Correctional Facility Inmate Rules and Regulations, and signs acknowledgments for same.

e) Conduct an initial Classification interview for each newly admitted inmate including:

1) A complete CJIS criminal history review will be completed on each defendant including:
   a) III
   b) NCIC
   c) CCH (N.J. Rap Sheet)
   d) OBCIS
   e) ACS – Automated Complaint System
   f) ATS – Automated Traffic System – The Single Entry Transaction (SET) Program is available to search items "a – d" with one inquiry.
   f) [sic] Review detainer, warrant, and open charges
   g) Interview inmate on housing unit.
   h) Complete CCIS objective classification screen instrument.
   i) Determine custody level assignment by Classification Committee.

j) Overrides requires supervisor signature.
k) Conduct a preliminary "Risk Assessment Screen" for each newly admitted inmate.
l) Assign each newly admitted inmate to appropriate housing.
m) Forward all Classification Records to the Records Unit.
n) Advise Center Count Control of custody level.

5) Center Count Control

a) Generate Housing Rosters and Count's Reports of CCIS twice per shift.
b) Distribute roster to housing unit's Intakes.
c) Review roster and physical count with CCIS and computer counts.
d) Reconcile count discrepancy and balance count for each housing unit, Intake and institutional totals.
e) Distribute report and close counts.
f) Reconcile DSI with CCIS count.

6) Discharge Process

a) Releases to the community (bail, ROR, Court Order, etc.).
1) Review all Court and legal documents to ensure there are no legal impediments to releases.

2) Complete CCIS, CCH, NCIC, III, ACS and ATS. Verify prisoner background check prior to release.
3) Collect County clothes, return property and personal items prior to release of individual, and sign final receipt and entry into the DSI System.
4) Issue a check for the balance of money from the Trust Account for the offender; include a signed receipt into the DSI.
5) Positively identify the offender prior to release by biometric fingerprint scan of the offender, comparing it to the photo on the wristband prior to release and removal of the wristband.
6) Locate the Victim Notification Form (if applicable) and contact/phone the victim to advise them of the pending release of the defendant. If there is no answer or no contact, calls should be made repeatedly until contact is made. If no contact is made for 2 hours, contact the Municipal Police Department where the initial arrest was made to inform them to notify the victim of the defendants release. All attempts of notification and notification itself must be recorded on the Victim Notification Form, and faxed to the County Prosecutor's Office.
7) Enter the discharge transaction into CCIS at the time of release and screen scrape into DSI.
8) Balance the count of the discharge unit (transportation) twice per shift and

maintained continuously through each shift.

b) Releases to other custody/jurisdictions (Municipal, State DOC, Federal or out-of state).

1) Review all Court and legal documents to ensure there are no legal impediments to releases.
2) Complete CCIS, CCH, NCIC, III, ACS and ATS. Verify prisoner background check prior to release.
3) Enter offender on CCIS Transportation and Discharge Count (screen scrape to DSI).
4) Place offender in Intake transportation.
5) Property – turned over to receiving jurisdiction.
6) Generate a check from DSI and give to inmate or receiving jurisdiction at the time of release.
   NOTE: A check for the transfer of all State Inmates will be provided to CRAF subsequent to transfer.
7) Release to other receiving jurisdiction.
8) Enter discharge into CCIS (screen scrape to DSI).
9) Balance counts twice per shift.

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 10-945

Supreme Court, U.S.
FILED
FEB 23 2011
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPPOSITION OF RESPONDENTS BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON; BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF BURLINGTON COUNTY JAIL; JOHN DOES 1-5 OF BURLINGTON COUNTY JAIL, INDIVIDUALLY AND OFFICIALLY IN RESPONSE TO FLORENCE'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The only question addressed by the Court of Appeals on the interlocutory appeal below was the question certified by the district court, to wit:

> Whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

As explained at greater length *infra*, Respondents perceive the question whether the Fourth Amendment permits searches of all persons *arrested* – the question posed by Petitioner – as different than the question whether the Fourth Amendment permits searches of all persons admitted to a jail facility's general population.

PARTIES TO THE PROCEEDING

Petitioner is Albert W. Florence. Respondents are the Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and in his official capacity as Warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; John Does 1-5 of Burlington County Jail, individually and officially; and John Does 6-8 of Essex County Correctional Facility, individually and officially.

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OPINIONS BELOW

The opinion of the Court of Appeals [App. A] is reported at 621 F.3d 296. The opinion of the district court [App. D] is reported at 595 F. Supp. 2d 492. The district court's opinion certifying that decision

for immediate appeal [App. C] is reported at 657 F. Supp. 2d 504. The Court of Appeals' order accepting jurisdiction over the appeal [App. B] is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 2010. On December 10, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

By its terms, the Fourth Amendment protects against "unreasonable" searches and seizures. In this case, the Court of Appeals for the Third Circuit concluded that it is not unreasonable for an Adult County Correctional Facility to follow a policy of strip searching all persons upon their admission to the general population of the Facility. Petitioner argued below that the Facility should first make an individualized finding of reasonable suspicion that a person is carrying contraband as to each individual it wants to search – at least in those cases involving persons arrested for non-indictable offenses. Without refer-

ence to the merits of Petitioner's policy preference – a subject on which reasonable people have been known to differ – the proposition that the Fourth Amendment of the Constitution of the United States compels the adoption of his policy choice is effectively foreclosed by this Court's holding in *Bell v. Wolfish*, 441 U.S. 520 (1979) and its affirmation of the legitimacy of a jail's institutional interests in *Hudson v. Palmer*, 468 U.S. 517 (1984).

1. In March 2005, a New Jersey State Trooper arrested Petitioner on an outstanding warrant. Although initially booked at the State Police Barracks, Petitioner was ultimately delivered to the Burlington County Jail for placement in the general population. Six days later, he was picked up by employees of the Essex County Correctional Facility for transport to that Facility. Although the Petition seems to suggest otherwise, the conduct that was under scrutiny by the courts below had nothing to do with Petitioner's arrest, the actions of the State Police, or, for that matter, the criminal behavior that gave rise to the outstanding warrant. To the contrary, the only issue in the courts below related to the intake procedures followed by the Burlington County Jail and the Essex County Correctional Facility.[1]

2. According to the facts found by the district court, as part of his admission into the general

---

[1] The arrest warrant was related to a guilty plea in 1998, when Petitioner fled from a traffic stop and later pled guilty to Hindering Prosecution in the third degree, a crime in violation of N.J.S.A. 2C:29-3 [Dkt. 76 Ex. A; Dkt. 94]. Petitioner failed to make the requisite monthly payments, and in April 2003, Essex County issued a warrant for his arrest. Shortly after the warrant was issued, Petitioner paid the $1310 balance owing, but the warrant remained outstanding.

population at the Burlington County Jail, Petitioner was asked to remove his clothes, shower with a delousing shampoo and body soap, and don jail-issued clothing [App. 64a]. Same-sex correction officers observed him throughout this process [App. 53a-57a]. They conducted a visual inspection for sores and other indicia of illness, tattoos, other identifying marks and contraband [App. 53a; 64a]. This visual inspection was not accompanied by any physical contact [App. 53a-54a; 64a]. As the district court also recognized, the Strip Search Authorization form indicated that Petitioner was not strip-searched, consistent with Burlington County policy and the officers' understanding of what a strip search was [App. 53a-57a].

Upon Petitioner's transfer to Essex County, he underwent Essex County Correctional Facility's intake procedures. As the district court found, Petitioner was called into the shower area with two other arrestees, directed to remove his clothes, enter a separate shower stall and shower and then to don jail-issued clothing [App. 59a]. Same-sex correction officers observed while he undressed and examined the interior of his mouth, his ears, nose, hair and scalp, his fingers, hands, arms and armpits, and all body openings and the inner thighs [App. 57a]. The visual observation did not include physical contact [App. 57a-59a].

3. After Petitioner was released, he brought suit on behalf of himself and a class of persons who had been required to disrobe prior to admission into the general populations of the Burlington County Jail and the Essex County Correctional Facility. His complaint, as amended, asserts class action claims under 42 U.S.C. §§ 1983, 1985, and 1986, for alleged

violations of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. The defendants responding here are: the Board of Chosen Freeholders of Burlington County; the Burlington County Jail; the Warden, in his official and individual capacity and certain unnamed officers said to have participated in the intake procedures complained of in this Petition. The Amended Complaint seeks declaratory and injunctive relief, compensatory and exemplary damages, and attorneys' fees and costs.

4. The district court certified a class on March 20, 2008. The court defined the class as:

> All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.

5. Petitioner moved for summary judgment and injunctive relief on June 27, 2008. Burlington County and Essex County cross-moved. Burlington County sought relief on three grounds: (1) that the search was constitutional under the Fourth Amendment; (2) that the individual officers were entitled to qualified immunity even if the search were held to be unlawful; and (3) that because Burlington County was carrying out state-mandated policies rather than its own, it was entitled to Eleventh Amendment immunity (as were the officers acting in their official

capacities). The district court held that the search was unconstitutional, and it denied qualified immunity to the officers in their individual capacities. It also denied Eleventh Amendment immunity to the officers in their official capacities and to the counties. The district court stated expressly, however, that the denial of Eleventh Amendment immunity was without prejudice, and it invited the defendants to renew the motion.

In deciding the cross-motions for summary judgment, there were certain substantive disagreements that the district court concluded that it did not need to resolve in order to decide whether the search was constitutional. *First*, the evidence was in conflict as to whether Petitioner was asked to lift his genitalia during the intake process. The district court did not consider the dispute material. *Second*, Respondents considered the visual inspection of Petitioner to be something less than a "strip search" (indeed, the intake form in this case stated that Petitioner was not "strip searched"). The district court nevertheless applied the label "strip search" because in its view "even the undisputed procedures of instructing arrestees to remove all of their clothing and subject their naked bodies to visual inspection 'rose to the level of a strip search' under the Fourth Amendment" [App. 6a; 64a-65a]. *Finally*, the parties disagreed as to whether, if the observation in question were a strip search, the search was nonetheless authorized under state law. These differences of opinion are noted here because the Petitioner's view of these facts pervades the Petition, and these were factual disputes expressly not resolved by the district court in

answering the Fourth Amendment question that was certified to the Court of Appeals.[2]

In support of its cross-motion for summary judgment, Burlington County articulated three institutional concerns that justified searching everyone admitted to the Jail's general population: increasing threats from contagious disease, and in particular MRSA; the prevalence of and danger from gangs; and the introduction of contraband into the jail.[3] Given that *Bell* had already affirmed the penological importance of protecting against contraband, Burlington County attached exhibits that focused on the health and gang identification issues. Essex County attached exhibits documenting gangs and contraband in its facility [Dkt. 131-13 (Ex. K)]. The district court ultimately rejected all three rationales, holding that none was sufficient to justify a suspicionless search.

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[2] To the extent that this Court is curious about what the district court termed "ambiguity" in the state law (which it considered only with reference to its qualified immunity analysis [App. 96a]), the New Jersey Code at the time permitted strip searches upon admission of anyone lawfully confined in an Adult County Correctional Facility, *see* N.J. Code 10A:31-8.5(b)(1), and Petitioner was in that category. It also authorized searches of persons lawfully confined under other conditions as well, one of which (prior conviction of a crime) would also have brought Petitioner within the Code. N.J. Code 10A:31-8.5(b)(2)-(7). Rather than discussing these provisions, Petitioner cites to a different Code provision – N.J. Code 10A:31-8.4 – that limits the searches to be performed on non-indictable arrestees, and he lists only two of the reasons in 8.5 – as though neither applied to him [Pet. at 4].

[3] It might even be argued that those arrested on non-indictable or other "minor" offenses would be particularly anxious to be assured of protection from such threats.

6. Respondents asked the district court to amend its order to permit an interlocutory appeal of the constitutionality of the search pursuant to 28 U.S.C. § 1292(b). The Petitioner opposed the motion. The district court granted Respondents' motion and certified the following question to the Court of Appeals: "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment" [App. 46a].

7. A panel of the Court of Appeals – Sloviter, J.; Hardiman, J.; and Pollak, J. (sitting by designation) reversed the district court in a 2-1 decision. Both the majority and the dissent applied *Bell*. Although the majority recognized the other two rationales (health issues and gang identification), it found the potential for smuggling contraband to be the "greatest security threat" [App. 20a]. Because it found the institutional need to detect and intercept contraband sufficient to warrant a search upon entry into a general population of a correctional facility without a need for individualized suspicion, the majority did not consider whether the other two rationales, singly or in combination, likewise justified the officers' observations of Petitioner [App. 20a-21a; 28a at n.9]. The dissent rejected only the contraband rationale and did not address the other two [App. 31a].

8. Following the decision of the Court of Appeals, the district court has proceeded with the other claims in the complaint. Petitioner has not sought to stay those claims. Given the decision by the Court of Appeals, Respondent has not needed to renew its motion for Eleventh Amendment immunity.

REASONS FOR DENYING THE WRIT

There is no good reason to grant certiorari here, and there are two excellent reasons to deny it. *First*, Petitioner has focused his Petition on extraneous facts that are unrelated to the specific interlocutory question that was certified to the Court of Appeals, thereby suggesting that the holding of that court is more far-reaching than it was and implying a procedural posture that is more final than it is. And *second*, the Court of Appeals did not apply the wrong law – and it did not apply the right law incorrectly.

I. THE QUESTION BEFORE THE COURT OF APPEALS (AND DISTRICT COURT) WAS NARROW AND INTERLOCUTORY.

The order sought to be reviewed here is interlocutory, and the case is still proceeding in the district court. Although this Court has jurisdiction to review § 1292(b) interlocutory orders under 28 U.S.C. § 1254(1), this Court has long held that the interlocutory status of a case "alone furnish[es] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Opinion of Scalia, J., concurring in denial of certiorari because there had not yet been a final judgment in the lower court); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 512 (1992) (following § 1292(b) certification of the preemption question to the Court of Appeals certiorari was denied; following trial, the Court of Appeals affirmed the district court's preemption rulings on remand, and the Supreme Court then granted certiorari); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968) (observing that certiorari was denied following the § 1292(b) appeal

but the issue was preserved and appealed post-trial). It is true that "[w]here there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari). But this is not such a case.

Petitioner bases much of his argument on what he characterizes as a clear-cut and fixed split between the circuits. It is certainly true that Courts of Appeals have come to different results on the question of which searches may be conducted without individualized suspicion without offending the Fourth Amendment. But – as is true with Fourth Amendment analysis in general – the decisions of the Courts of Appeals are not quite as "black and white" as Petitioner contends. Indeed, that is to be expected when an analysis is by its terms fact- and situation-specific. Courts have upheld practices very similar to the ones reviewed by the Court of Appeals here as reasonable even within some of the circuits Petitioner lists as uniformly holding such practices unconstitutional. *See, e.g., Kelsey v. Cnty. of Schoharie*, 567 F.3d 54, 65 (2d Cir. 2009) (clothing exchange for detained misdemeanants does not require individualized suspicion); *N.G. v. Connecticut*, 382 F.3d 225, 237-38 (2d Cir. 2004) (upholding strip searches upon entry into juvenile custody – though not afterwards – without individualized suspicion, even as to persons admitted as truants, runaways, or members of "families with service needs"); *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 958 (6th Cir. 1987) (upholding policy of strip-searching detainees who were required – for whatever reason – to be moved into a general jail population); *Stanley v. Henson*, 337 F.3d 961,

967 (7th Cir. 2003) (upholding clothing exchange characterized as a strip search, even though the detainee was allowed to retain underwear); *Schmidt v. City of Bella Villa*, 557 F.3d 564, 573 (8th Cir. 2009) (upholding male officer's requirement that a female arrestee unzip her pants so that he could photograph a tattoo).[4] And in that regard, it is significant that some of the facts that have been found material by those and other courts were sharply disputed in the district court. The district court decided that it did not need to resolve those facts (including what Petitioner was required to do) in order to reach the legal issue before it. The absence of such factual findings here could hinder the Court's ability to draw a bright line to guide other courts.

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[4] It is also true that many of the cases cited by the Petitioner were decided in the early 1980s, and the increased threats that society faces may have affected the public perception of when strip searches are reasonable. That perception may well have had an impact on courts such as the Ninth and Eleventh Circuit Courts of Appeal as they have reconsidered their positions *en banc*. *See Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), *remanded*, No. 05-16734, 2009 U.S. App. LEXIS 974 (11th Cir. Jan. 20, 2009) (for directed factual development). As this Court explained in *United States v. Knotts*, 460 U.S. 276 (1983), the Fourth Amendment is implicated only if a person has a "justifiable," "reasonable," or "legitimate" expectation of privacy – one that is not just self-perceived but that "society is prepared to recognize as 'reasonable.'" *Id.* at 280-81. *Cf., Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 613-16 (2007) (not unreasonable to require two persons who were not of the same race as the persons identified in a warrant to remain undressed while police searched the room for weapons); *BNSF Ry. Co. v. U.S. Dep't of Trans.*, 566 F.3d 200, 208 (D.C. Cir. 2009) (upholding requirement that transportation employees who failed or refused a drug test be directly observed giving samples, with genitalia fully exposed).

Given this situational sensitivity, it is significant that the question the Petitioner has presented to this Court is different than the question that was reviewed by the Court of Appeals. Certainly one can imagine a circumstance in which the holding of a Court of Appeals goes beyond (or is narrower than) the question certified to it, and in such a case a Petitioner might craft a question to reflect the holding of the Court of Appeals rather than the question certified to that court. But in this case the Court of Appeals addressed directly and squarely the question presented to it. It is Petitioner who wants to ask a different question.

This Court has no reason to pass on a question that is not encompassed within a district court or Court of Appeals holding. *See United States v. Cherokee Nation*, 480 U.S. 700, 702 n.1 (1987) (recognizing that the "duty to engage in fair and honorable dealings" pressed by the Cherokee Nation was not the takings question addressed by the district court or certified to or considered by the Court of Appeals). Instead of addressing whether a strip search is constitutional upon any arrest, the Court of Appeals was asked whether a strip search is constitutional upon the admission of an inmate into a Correctional Facility's general population. With all due respect, those questions are quite different – both in the institutional justifications for the search and in the balance between state and arrestee interests. The Court of Appeals was not presented with (and thus had no occasion to consider) whether a policy that allowed – as one example – for disrobing and observation of persons who were merely taken to a police station, booked, and then released would be constitutional – or the even more extreme circumstance where a person is strip-searched in a public or

exposed location. *See Campbell v. Miller*, 499 F.3d 711 (7th Cir. 2007) (reviewing a search in an "open" backyard of a defendant who was issued a citation at the time and released).[5] Yet both of those searches would be encompassed within Petitioner's suggested question, which purports to cover "every individual arrested for any minor offense no matter what the circumstances."

This Court has also taught that the weight a court should accord to the government's interest varies by setting and by posture. It has drawn that distinction between a random stop and an arrest based upon a warrant. *See, e.g., United States v. Robinson*, 414 U.S. 218, 227-28 (1973) (explaining the "fundamental difference" between a search in the absence of probable cause to arrest – which must be "strictly circumscribed by the exigencies which justify its initiation" and a search incident to arrest); *see also Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("The state officers arrested Moore, and therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'" (citation omitted)). There is no less of a distinction between the institutional interests attendant upon an "arrest" and the institutional interests that Burlington County articulated – all of which were related to the special concerns of the "myriad of 'institutional needs

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[5] In *Campbell*, the Court of Appeals for the Seventh Circuit upheld the decision to conduct a strip search but required "a higher threshold for reasonableness" because the arrest was non-custodial, and the only rationale for the search was to preserve evidence – a rationale that required reasonable suspicion. *Id.* at 717. It found, however, that the exposure was public and unwarranted – and thus that the manner of the search was unreasonable. *Id.* at 718.

and objectives' of prison facilities." *Samson v. California*, 547 U.S. 843, 862 (2006) (Breyer, J., Stevens, J., Souter, J., dissenting, objecting to the application of institutional concerns to evaluate a search of parolees).[6]

Inasmuch as the question raised by the Petition – as opposed to the question addressed by the Court of Appeals – is outside the "context of meaningful litigation" and posed "abstractly," there is no reason to grant a writ of certiorari to consider such a question. *The Monrosa v. Carbon Black Export, Inc.*, 359

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[6] Petitioner draws on snippets excerpted from a number of only partially apposite cases discussing the Fourth Amendment's application to schoolchildren and to employee drug testing to support his contention that searches *of this nature* – *i.e.*, upon entry to the general population of a jail – are proscribed under the Fourth Amendment. Thus, Petitioner (1) characterizes the intrusiveness of the search based on the assessment this Court made when reviewing a search of a middle-school girl thought to have brought prescription or over-the-counter medication to school in the past, *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. ___, 129 S. Ct. 2633, 2643 (2009) (discussed at Petition at 17, 18); (2) discusses individualized suspicion in the context of a warrantless search, *see Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968) (discussed at Petition at 19); and (3) relies heavily on other purely civil drug testing cases: *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (reviewing Georgia's drug test requirement for candidates for state office); *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 606 (1989) (reviewing Federal Railroad Administration regulations mandating drug and alcohol testing of railroad employees involved in train accidents); *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (reviewing blood testing of individual arrested for driving under the influence of alcohol). Perhaps because Petitioner does not like the outcome, he does not cite to the similarly partially apposite suppression case permitting evidence uncovered during a clothing exchange to be admitted. *See United States v. Edwards*, 415 U.S. 800 (1974).

U.S. 180, 184 (1959); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107-08 (2001) (dismissing writ as improvidently granted where challenge in the Supreme Court was to programs beyond those considered by the Court of Appeals); *Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (question posed concerned an officer engaged in private conduct; instead, the officer was engaged in official conduct).

II. THE COURT OF APPEALS CORRECTLY IDENTIFIED AND APPLIED *BELL v. WOLFISH*, 441 U.S. 520 (1979) TO THE FACTS BEFORE IT.

As noted above, in an interlocutory case such as this, certiorari would be warranted only if there were a clear-cut error in identifying or applying the proper standard. Here, Petitioner recognizes that this Court's precedent in *Bell* required the Court of Appeals to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." 441 U.S. at 559. And that is precisely what the Court of Appeals did. Because the Petitioner is not taking issue with the standard the Court of Appeals applied, but instead merely disagrees with the result it reached, there is no reason for this Court to grant the writ. As the decisions discussed above show, the answers to *Bell*'s questions can lead to the classification of certain searches as "reasonable" or "unreasonable" under the Fourth Amendment based on search-specific nuances. "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967) (upholding building code inspections

on an area-wide basis). Of necessity, where and under what circumstances a search is conducted is critical to the determination of the reasonableness of the search. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (recognizing that a search that would be impractical, unreasonable, or embarrassingly intrusive done on the street can be performed more readily and privately at the police station).

Petitioner is simply incorrect in contending that this Court has mandated "individualized suspicion" when arrestees are placed in the general jail population. Instead, this Court has stated (and reaffirmed on several occasions) that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (citing cases); *Samson*, 547 U.S. at 855 n.4 ("The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion."); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (recognizing that safety and administrative regulations are instances when governmental interests may justify searches "without any measure of individualized suspicion"). Accordingly, although individualized suspicion is the ordinary justification for searches, there are exceptions when there are "special needs, beyond the normal need for law enforcement." *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997).[7] Prison administration is one such "special need." *See, e.g., Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619-20 (1989) (listing *Bell* among the cases

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[7] In the Petition, Petitioner characterizes *Chandler* – a case in which this Court determined that Georgia could not mandate drug testing for every candidate for public office – solely as recognizing the "normal requirement of individualized suspicion" [Pet. at 19].

authorizing special needs searches that do not require individualized suspicion). As this Court explained in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) – there, upholding drug testing of certain customs officials – the special needs analysis applies particularly when the Government is seeking to "prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id.* at 668.

Petitioner's assertion that this Court has mandated individualized suspicion to justify a strip search for a minor offense, Pet. at 16-22, is also flatly inaccurate. In *Bell*, the Court upheld a "body cavity" search, which is more intrusive than a "strip search" – regardless of whether "strip search" is used as a term of art or as a broad descriptor of any sort of inspection of a disrobed or partially disrobed person. The Court upheld that search as to all persons – including without distinction witnesses, contemnors, pretrial detainees and inmates awaiting transport or trial – upon their return to the general population following contact visits. 441 U.S. at 524. And this Court affirmed the fact that *Bell* did not require individualized suspicion when it allowed for suspicionless testing of public school athletes for drugs. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 n.3 (1995).

Petitioner's repeated reliance on cases from other settings, *see supra* n.6, ignores this Court's instruction that any evaluation of a search requires the balancing of "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559. In this regard, it

is notable that in the speedy trial context – an analysis that likewise calls for a "balancing test" – the Court has explained that it would not ordinarily review a case that assessed the reasonableness of an application of such a test, and it has made exceptions only when a Court of Appeals or a state Supreme Court committed clear error. *See, e.g., Vermont v. Brillon*, 556 U.S. __, 129 S. Ct. 1283, 1291 (2009) ("[T]he balance arrived at in close cases ordinarily would not prompt this Court's review. But the Vermont Supreme Court made a fundamental error in its application of *Barker* [*v. Wingo*, 407 U.S. 514 (1972)] that calls for this Court's correction"); *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (finding Arizona Supreme Court was "in fundamental error in its reading of *Barker v. Wingo*").

Here, there has been no such fundamental error warranting the Court's attention. Instead, the Court of Appeals engaged in a straightforward application of the well-recognized *Bell* factors as they applied to the particular situation at hand – a situation that is not at all apparent from the Petition. The people who were observed by correctional officers were arrestees who were being admitted to the general population of the Burlington County Jail and the Essex County Correctional Facility. The visual observation was part of a process whereby the person showered and put on jail-issued clothing. Nowhere does Petitioner acknowledge that the reasons articulated by Burlington County in the district court and the Court of Appeals for conducting that observation extended beyond a concern over contraband. The summary judgment record documented the threats the institution was seeking to address and the ways in which the threats have become more pronounced in recent years [Dkt. 130-1-15]. These included both health

threats and the increasing need to identify gang members upon their entry into the institution. The Court of Appeals did not need to consider these other rationales, because contraband was a sufficient reason for the search in *Bell* and the Court of Appeals considered it sufficient in this case as well [App. 12a].

But the fact that the Court of Appeals did not need to rely on the additional rationales does not change the reality that Burlington County faces multiple and increasing challenges in meeting the needs of all the persons it is charged to protect. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court recognized that administrators were to "take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors." *Id.* at 526 (upholding a prison cell search).

> They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize.

Id. at 526-27. And they are required "to maintain as sanitary an environment" as possible. *Id.* at 527.

Although the district court did not find the threat of contagious diseases sufficient to support the search, Courts of Appeals have recognized the legitimacy of that interest – and the potential consequences if prisoners are not protected. *E.g., Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989) (uphold-

ing mandatory AIDS testing without any demonstration of individualized suspicion). As the Court of Appeals for the Tenth Circuit explained, applying *Bell*, the generalized interest of the state in protecting public health is balanced against the intrusiveness of the search (in that case, blood tests) but the fact that the person is in custody "changes the relative weight accorded each interest." *Id.* at 1194 (discussing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).[8] The institutional need to protect inmates also has constitutional implications. *See Hall v. Cole*, No. 08-4904 (NLH), 2009 U.S. Dist. LEXIS 6412, at *27-30 (D.N.J. Jan. 28, 2009) (refusing to dismiss Eighth Amendment claims against the Warden, certain named correctional officers and the Burlington County Board of Freeholders where an inmate alleged that he was housed with a person with infectious open sores and that he contracted infectious lesions from him).[9] The applicability of the recogni-

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[8] *Turner* is one of a number of cases designed to "ensure that courts afford appropriate deference to prison officials," *Washington v. Harper*, 494 U.S. 210, 224 (1990) – even when constitutional rights are at issue; *see also Shaw v. Murphy*, 532 U.S. 223, 232 (2001) (observing that a challenge must overcome the presumption that administrative action was within broad discretion). Under the third *Turner* factor, this Court has said that deference is particularly important when "the right in question 'can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.'" *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989) (excluded publications). Moreover, the Court refused to require officials "to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner*, 482 U.S. at 90-91.

[9] As with medical care, the Burlington County Jail and its officers have been subjected to litigation about whether they adequately protected against gangs. *See Paulino v. Burlington*

tion in *Von Raab* that states need to "prevent the development of hazardous conditions" and "detect violations that rarely generate articulable grounds for searching any particular place or person" takes on significance in these contexts. 489 U.S. at 668.

The Petition reflects frustration, and, given the circumstances of the case, perhaps Petitioner's frustration is understandable. That frustration, however, has nothing to do with the Fourth Amendment. Petitioner may well be frustrated with a system that continues to show a warrant as outstanding even after it has been satisfied. But this litigation does not purport to address – much less

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Cnty. Jail, No. 07-5315 (RBK), 2010 U.S. Dist. LEXIS 132509, at *1-2 (D.N.J. Dec. 14, 2010) (dismissing on summary judgment lawsuit brought by pretrial detainee awaiting trial assaulted by gang members). Here, Petitioner suggests that even the contraband rationale should have been rejected as pretextual and unsupportable – an odd position to take given this Court's recognition of such concerns as valid in *Bell* and *Hudson*. In any event, this Court has established the opposite presumption: the burden is not on the jail, because these considerations are "peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 128 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (First Amendment right of association)). Asking whether an infringement of a constitutional right is reasonably related to a legitimate penological interest "ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration' and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'" *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987) (superseded in part by 42 U.S.C. § 2000cc-2).

resolve – that problem. It could also be that Petitioner is frustrated at the state law gap between N.J. Code 10A:31-8.4 and 8.5. If so, the New Jersey legislature has already addressed the ambiguity (in July 2010) – and has limited the persons who can be searched under Section 8.5 to "persons lawfully confined for commission of a crime." N.J. Code 10A:31-8.5 (emphasis supplied). Strip searches of persons detained or arrested for commission of an offense other than a crime are now authorized only under N.J. Code 10A:31-8.4 and only under specific limited circumstances.[10] It goes without saying, of course, that a state can enact laws more protective of privacy than the Fourth Amendment requires, in accordance with its values, but "its choice of a more restrictive option does not render the less restrictive

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[10] *See* N.J. Code 10A:31-8.4 ("(a) A person who has been detained or arrested for commission of an offense other than a crime and who is confined in an adult county correctional facility shall not be subject to a strip search unless: (1) The search is authorized by a warrant or valid documented consent; (2) A recognized exception to the warrant requirement exists and the search is based on probable cause that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; (3) The person is lawfully confined and the search is based on reasonable suspicion that a weapon, controlled substance, contraband or evidence of a crime will be found, and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; or (4) Emergent conditions prevent obtaining a search warrant or authorization of the custody staff supervisor in charge and such emergent conditions require custody staff to conduct a strip search in order to take immediate action for purposes of preventing bodily harm to the officer, person or others.")

ones unreasonable, and hence unconstitutional." *Virginia v. Moore*, 553 U.S. 164, 174 (2008); *see also Arkansas v. Sullivan*, 532 U.S. 769 (2001).

It may also be that Petitioner's frustration is with New Jersey's determination that all arrestees can be sent to jail. But not only does the Fourth Amendment not demand establishing "worthiness" prior to a search, such a policy would be flatly inconsistent with the Fourth Amendment. As this Court explained in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* at 347; *see also Illinois v. Andreas*, 463 U.S. 765, 772-73 (1983) (recognizing that a Fourth Amendment standard must be (1) "workable for application by rank-and-file, trained police officers;" (2) reasonable; and (3) "objective, not dependent on the belief of individual police officers"). Indeed, if jailers were required to identify which persons were "likely" to be gang members or to be ill, such a subjective determination would raise concerns under the Equal Protection Clause of the Fourteenth Amendment. *See Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 983-88 (9th Cir. 2010) (*en banc*) (concurring opinion) (discussing at length the problems – including Equal Protection concerns – with exempting certain persons or categories of persons from a search regime); *Johnson v. California*, 517 U.S. 806, 813 (1996) (noting in context of Fourth Amendment traffic stop inquiry that intentionally discriminatory application of laws would also implicate Equal Protection Clause); *Whren v. United States*, 543 U.S. 499, 507-10 (2005) (strict scrutiny is

to be applied where upon admission to a jail inmates were initially segregated by race and nation of origin to avoid commingling rival gang members).

The fact is that the Court of Appeals properly applied *Bell* to balance the needs of jail administration against the privacy interests of those entering into that population. That is what the Fourth Amendment requires. Any state law ambiguity does not implicate the Constitution and, in any event, has been addressed by the state legislature. All of which suggests that if this Court were to grant certiorari here and now, its decision would at best be of the sort of "isolated significance" that counsels against review. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76-77 (1955).

CONCLUSION

New Jersey had a practice that its jail administrators believed – and continue to believe – properly recognized the valid concerns of staff and inmates and balanced those against the privacy interests of persons newly admitted to custody. Nothing in the Fourth Amendment or this Court's jurisprudence construing that Amendment discounts the importance of the penological interests at stake here. Nor does anything in this Court's jurisprudence require a jail to ask for individualized determinations whether a person has enough "risk factors" to warrant a search for gang identification, contagious disease, or contraband before placing that person in the general population. The Fourth Amendment does not require that federal courts micromanage jail administration or demand individualized assessments beyond assuring that a search is "reasonable" – *i.e.*, that the legitimate penological concerns of the jail are

balanced against the privacy interests of those who are taking up residence within it. It follows that this Court should deny the Petition.

Respectfully submitted.

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OPPOSITION BRIEF

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No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ESSEX COUNTY CORRECTIONAL FACILITY AND ESSEX COUNTY SHERIFF'S DEPARTMENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Essex County Correctional Facility's alleged former practice of conducting visual searches of all arrestees, all of whom were housed in the general jail population regardless of the offense for which they were arrested, did not violate the Fourth Amendment.

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BRIEF IN OPPOSITION

The conflict in the circuits petitioner identifies is not worthy of review by this Court at this time or in this case for several reasons. Recent *en banc* decisions by the courts of appeals and ongoing *en banc* activity suggest that further percolation would be beneficial and that the conflict, which has existed for several years already, may disappear. The *en banc* Fifth Circuit recently heard oral argument on the question presented here and thus may soon overturn—as did the Eleventh and Ninth Circuits—its precedent in tension with the decision below. The remaining circuit cases on petitioner's side of the ledger all are more than a decade old and thus do not address the emerging view in the circuits. Additionally, none of the cases that adopt petitioner's view applies the correct standard of review, *viz.*, the highly deferential test set forth in *Turner* v. *Safely*, 482 U.S. 78 (1987). Had they done so, the outcomes likely would be far more consistent across the circuits. Moreover, last term, this Court denied a petition for certiorari presenting the same issue and alleged circuit split identified here. *Saulsberry* v. *Myers*, 130 S. Ct. 1735 (2010) (No. 09-451). The case for review is even weaker here given the *en banc* Fifth Circuit's imminent decision, which would provide a more compelling case for this Court's review if the Fifth Circuit does not reverse itself, and because this case is an exceedingly poor vehicle for review. In sum, the petition should be denied.

STATEMENT OF THE CASE

1. During a traffic stop in March 2005, a New Jersey state trooper arrested petitioner based on an outstanding bench warrant from Essex County, New

Jersey. App. 3a. After the arrest, petitioner was taken to the Burlington County Jail (BCJ). *Id.* As the courts below recognized, the parties dispute the thoroughness and intrusiveness of the BCJ search. *Id.* at 6a, 63a-65a. Petitioner alleges that during intake, BCJ personnel directed him to remove all his clothing and subjected him to a visual search (or "strip search") during which he had to open his mouth, lift his tongue, and lift his genitals. *Id.* at 3a (noting petitioner's assertion that BCJ conducted a "visual body-cavity search"). After the search, petitioner was held in BCJ's general jail population for six days. *Id.* at 3a, 51a-52a.

The Essex County Sheriff's Department then took custody of petitioner and transported him to the Essex County Correctional Facility (ECCF). App. 3a. ECCF, the largest jail in the State, is located in Newark. It houses, *inter alia*, prisoners sentenced in the county, inmates from other jurisdictions, including federal offenders and state-remanded prisoners, and detainees awaiting trial on a range of charges. There is no indication that the Sheriff's Department or ECCF personnel knew whether and how petitioner had been searched at BCJ.

Petitioner alleges that, pursuant to then-existing ECCF policies, he was required to remove his clothes and was subjected to a visual search, including a visual body-cavity search, while he took a supervised shower. App. 3a-4a. Again, the nature of the search petitioner alleges he underwent is in dispute. *Id.* at 6a, 63a-65a. As the district court acknowledged, the parties disputed "whether the strip search[] even occurred" at ECCF and disagreed about the scope of any such search that occurred. *Id.* at 66a.

ECCF's written policy in effect when petitioner was admitted provided that before all arriving prisoners

took a required shower and received jail-issued clothing, the inmates would be subject to "strip searches." App. 140a-142a. The policy stated that the reception officer was, *inter alia*, to have the inmate empty and turnout his or her pockets and undress completely. *Id.* at 141a. The policy then instructed the officer to observe the "interior of the mouth," the ears, nose, hair and scalp (requiring "the inmate run his/her fingers through his/her hair"), and the fingers, hands and arms. *Id.*; see *id.* at 142a (requiring the officer to physically search all clothing and shoes, and to open inmates' wallets, letters and other items to search for contraband). Although the policy also stated that the officer was to "[i]nspect all body openings, the inner thighs, and the soles of the feet and between the toes," a subsequent paragraph within the same section of the policy stated that "[b]ody cavity searches shall take place when legally authorized by a search warrant or consent that probable cause exists." *Id.* at 142a; see *id.* at 142a-143a (requiring medical personnel to conduct body cavity searches, and imposing mandatory reporting requirements for any such searches).

Petitioner claims that while naked he was "directed to open his mouth," required to "lift his genitals," and to "squat and cough" with his back facing an officer. App. 4a, 52a; *id.* at 65a-66a. ECCF personnel testified that the former policy did not permit inmates to be searched upon admission in the manner petitioner alleged, and testified further that, notwithstanding the written policy, they did not conduct strip searches upon admission as a matter of course.[1]

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[1] *See, e.g.*, Joint Appendix at 342-343, *Florence*, Nos. 09-3603 *et al.* (filed 3d Cir. Nov. 25, 2009) (hereafter "CA3 App.") (testifying that upon admission, an officer would see inmates naked

It is undisputed that petitioner joined the general jail population and remained in that population until the next day when charges against him were dismissed. App. 4a. It also is undisputed that the ECCF "strip search" policy in force at the time of petitioner's admission was discontinued in April 2005 for reasons unrelated to petitioner's suit. See Pet. 6; App. 5a n.2 (contrasting ECCF's written policies over time); *id.* at 57a-58a (same); see also Supplemental Appendix at 40, *Florence*, Nos. 09-3603 *et al.* (filed 3d Cir. Jan. 14, 2010) (reproducing April 21, 2005 policy); App. 145a-166a (June 2008 revision).

2. Petitioner brought suit under 42 U.S.C. § 1983 against BCJ, ECCF and various related individuals and municipal entities claiming that the alleged searches violated the Fourth Amendment.[2] Although

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while showering from several feet away, but inmates "are not checked" for contraband); *id.* at 343 (officer on duty at time of petitioner's admission had never conducted or authorized a strip search); *id.* at 348 (officers did not search hands, feet and mouth of detainees upon admission); *id.* at 350-351 (officers were not authorized to visually search anal cavity or to command the inmate to squat and cough); *id.* at 354 (testimony from officer, who regularly worked intake at the time of petitioner's admission, that he has not conducted a strip search since 1996); *id.* at 360 (body cavity searches, including requiring "a squat and cough," were not done at intake as a matter of course); *id.* at 391 (a request that the inmate "squat and cough" would have required medical assistance). *See also id.* at 345, 352, 354 (officers would have needed to complete paperwork were petitioner searched in the manner he described).

[2] Petitioner also brought a host of federal civil rights claims not relevant to this appeal. See CA3 App. 120-121 (§ 1983 claims for unlawful arrest and false imprisonment); *id.* at 125-126 (discrimination claims pursuant to 42 U.S.C. §§ 1985, 1986); *id.* at 126 (unreasonable detention in violation of the Fourth Amendment). These claims are still pending and thus this case is interlocutory.

petitioner argues that the strip searches to which he was allegedly subjected violate New Jersey statutes and regulations, see Pet. 4-5, 28-29, he did not, however, pursue any state law remedies. The district court granted petitioner's motion for certification of a class of arrestees who were required "'to strip naked before [BCJ or ECCF] officers ... without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs, or weapons.'" App. 4a, 49a; see also *id.* at 5a n.1 (noting that petitioner did not seek certification of his claim that he underwent a "visual body cavity search").

On cross-motions for summary judgment, the district court recognized "there were facts in dispute" concerning the details of BCJ's and ECCF's alleged strip search policies and the extent of the searches to which petitioner was subjected. App. 6a. Nonetheless, the district court concluded that "'[w]hatever the case may be,'" the searches "'rose to the level of a strip search' under the Fourth Amendment." *Id.*; see *id.* at 65a-66a. The court granted the plaintiff-class's motion for summary judgment, holding that "'blanket strip searches of non-indictable offenders, performed without reasonable suspicion ... are unconstitutional.'" *Id.* at 7a (alteration omitted).

The district court reasoned that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), required respondents to demonstrate individualized reasonable suspicion to conduct a strip search of any "non-indictable" inmate upon admission. App. 84a-87a; see generally *id.* at 53a n.3 (discussing "non-indictable" category of offenses under N.J. Stat. Ann. § 2C:1-4(b)). In *Bell*, this Court held that a policy requiring *all* inmates detained at a federal short-term holding facility to undergo strip searches, including visual body cavity inspection,

after custodial visits did not violate the Fourth Amendment. 441 U.S. at 560.

In holding the policies unconstitutional, the district court brushed aside the institutions' showings that subjecting newly admitted inmates to strip searches is justified by significant security interests. See App. 84a-86a. Notwithstanding petitioner's representation to this Court that "respondents[] bald[ly] assert[ed]" that strip searches of all inmates upon intake serve important governmental interests, Pet. 28, respondents were the *only* parties who submitted evidence on this subject.

Specifically, the Essex respondents presented evidence from Dr. George M. Camp, an expert on correctional practices who testified in the district court proceedings that gave rise to *Bell*, see CA3 App. 315-316, and whose studies have been credited by this Court. See *Turner* v. *Safley*, 482 U.S. 78, 92-93 (1987) (citing G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* 64-65 (1985)). Dr. Camp opined that conducting strip searches of new arrivals is "an essential function in protecting the security and institutional integrity of a jail." CA3 App. 320. He explained that inmates arrested for misdemeanors "can be more dangerous and ... more likely to bring in contraband" if it is known that such inmates will not undergo strip searches upon admission. *Id.* at 316; see *id.* at 317 ("interaction and mingling between misdemeants and felons" make it imperative that the former category of prisoners also be searched). Dr. Camp also noted that if arrestees know that certain categories of offenders will not be searched, "[t]hese weak links [will be] discovered by the inmate population and exploited to the detriment of both prisoners and staff." *Id.* at 318. See also App. 85a-

86a (noting BCJ's evidence regarding importance of visual searches to prevent contraband, to discover gang membership, and to prevent disease).

After the district court entered summary judgment for petitioner and the plaintiff-class, BCJ and ECCF successfully moved the court pursuant to 28 U.S.C. § 1292(b), to certify for interlocutory appeal whether "'a blanket policy of strip searching all inmates upon admission to a county correctional facility'" violates the Fourth Amendment. App. 40a; see also *id.* at 40a n.4, 7a (district court's reframing of the question to focus on "'non-indictable arrestees'").

3. On appeal, the Third Circuit reversed. Applying *Bell*'s balancing test, see App. 17a-28a, the court of appeals found that, even as described by petitioner, "the scope, manner, and place of the searches are similar to or less intrusive than those in *Bell*." *Id.* at 20a; see *id.* at 19a (the alleged searches were comparable to those upheld by the district court in *Bell*). Therefore, the court turned to the jails' justifications for strip searching newly admitted prisoners, including those arrested for non-indictable offenses. *Id.* at 20a.

Recognizing that the facilities had an undeniable interest in preventing smuggling of contraband, the court below rejected the argument that "jails have little interest in strip searching arrestees charged with non-indictable offenses." App. 21a. It concluded that petitioner's argument was irreconcilable with *Bell*, which "explicitly rejected any distinction in security risk" between detainees and convicted inmates. *Id.* at 21a-22a. Next, the court rebuffed petitioner's argument that "individualized suspicion" was required "for each inmate searched." *Id.* at 22a; see *id.* at 22a n.8. It found that contention contrary to *Bell* in which this Court upheld a policy of strip

searches as a whole without considering the circumstances of particular inmates. *Id.* at 22a-23a. The Third Circuit then rejected the claim that non-indictable offenders present a lower risk of smuggling contraband. *Id.* at 23a. The court found support in *Block* v. *Rutherford*, 468 U.S. 576 (1984), in which this Court upheld a blanket ban on contact visits with pretrial detainees, recognizing that "'low security risk detainees'" would "take advantage of any gap in security." App. 24a. Finally, the Third Circuit grounded its disposition in this Court's "repeated[] ... emphasi[s] that courts must defer to the policy judgments of prison administrators." *Id.* at 26a (collecting cases, including *Bell*); see *id.* at 27a-28a (discussing jails' justifications for the policies).

The Third Circuit remanded the case to the district court, App. 28a, where petitioner continues to litigate his other federal civil rights claims, see Docket, No. 1:05-cv-03619 (D.N.J.); *supra* at 4 n.2.

REASONS FOR DENYING THE PETITION

I. THE CONFLICT IN THE CIRCUITS PETITIONER IDENTIFIES DOES NOT NECESSITATE REVIEW.

Respondents acknowledge that there are divisions in the courts of appeals regarding whether a policy requiring strip searches of all inmates, including those arrested for non-indictable offenses or misdemeanors, upon admission to a correctional facility violates the Fourth Amendment. But it strains credulity to claim that the circuits are "*irreconcilably* divided" on this issue. Pet. 13 (emphasis added, capitalization omitted).

1. Recent developments show that the circuits are capable of resolving any meaningful conflict

concerning the question presented. Consistent with the decision below, two courts sitting *en banc* recently overturned their former circuit precedents holding that strip searches of inmates (including those arrested for misdemeanors) upon admission violate the Fourth Amendment. *Bull* v. *City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Powell* v. *Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

Moreover, as petitioner acknowledges (at 15 n.1), the Fifth Circuit granted rehearing *en banc* to reconsider its longstanding precedents supporting petitioner's interpretation of the Fourth Amendment. *Jimenez* v. *Wood Cnty., Tex.*, 621 F.3d 372 (5th Cir.), *reh'g en banc granted*, 626 F.3d 870 (5th Cir. 2010). The *en banc* court heard oral argument on January 19, 2011. See Docket, *Jimenez*, No. 09-40892 (5th Cir.). That case squarely presents the question whether a county jail violated the Fourth Amendment rights of plaintiff, who was arrested for a misdemeanor, by strip searching him upon admission pursuant to jail policy. See *Jimenez*, 621 F.3d at 374 ("The parties agree ... it was the department's policy to perform strip searches on all detainees entering the jail who were arrested for a felony, Class A misdemeanor, or Class B misdemeanor."); compare *infra* § III (discussing vehicle problems here). The Fifth Circuit's *en banc* review of this issue, like the prior *en banc* reviews of the Eleventh and the Ninth Circuits, suggests that any conflict in the circuits can be resolved without this Court's intervention.

2. If the *en banc* Fifth Circuit were to stem the emerging tide, perhaps the case for review would be stronger, but this Court's intervention certainly would be premature here. Indeed, just last Term, this Court denied *certiorari* in a case presenting the same issue now raised here. *Saulsberry* v. *Myers*, 130

S. Ct. 1735 (2010) (No. 09-451). After the Eleventh Circuit issued its *en banc* decision in *Powell*, a panel of the Tenth Circuit adhered to binding circuit precedent holding that strip searches of misdemeanor arrestees on admission violate the Fourth Amendment. *Myers* v. *James*, 344 F. App'x 457, 459-60 (10th Cir. 2009), *cert. denied sub nom.* 130 S. Ct. 1735 (2010). Not only was that petition's first question presented materially indistinguishable from the question posed here, see Pet. at i, *Saulsberry*, No. 09-451, 2009 WL 3341925 (filed Oct. 14, 2009), but the petitioner identified the same conflict in the circuits, *id.* at 10-19, and argued at length that the Ninth Circuit's *en banc* decision in *Bull* exacerbated the need for review. Supp'l Br. for Pet'rs at 1-7, *Saulsberry*, No. 09-451, 2010 WL 638461 (filed Feb. 19, 2010). Having denied *certiorari* in *Saulsberry*, nothing warrants a different result here. On the contrary, given the Fifth Circuit's ongoing *en banc* review, there is a stronger case for allowing these issues to continue to percolate.

3. Additionally, the circuit cases petitioner cites as favoring his view themselves indicate that further development in the circuits would be fruitful. See Pet. 14-15 n.1. All, aside from *Jimenez*, are at least a decade old. *Id.* Therefore, none engages with *Powell*, *Bull* or the decision here. More significantly, none applies the deferential standard of review set forth in *Turner* v. *Safley*, namely "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89 (citing, *inter alia*, *Bell*).

Although the majority of those circuit cases predate *Turner*, the rest simply ignore it. They do so despite this Court's admonition that "[w]e made quite

clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U.S. 210, 224 (1990) (emphasis added). Although the court below and the Eleventh Circuit declined to reach *Turner*'s application to the searches at issue, App. 18a n.5; *Powell*, 541 F.3d at 1302-03, the Ninth Circuit correctly held that *Turner* controlled and concluded that the searches were constitutional under the "reasonable relationship" test. *Bull*, 595 F.3d at 973-74; see also *Michenfelder* v. *Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (inmate's Fourth Amendment claims regarding strip searches failed under *Turner*).[3] Had the circuit court decisions upon which petitioner relies applied the *Turner* test, the outcomes also might have been different.

4. Finally, several of the cases upon which petitioner relies do not squarely address the issue presented here and are so fact-bound that it is not clear that those circuits would depart from the

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[3] Consistent with *Washington* v. *Harper*, many appeals courts—including those that previously adopted the individualized suspicion rule for which petitioner advocates—have applied the *Turner* standard to Fourth Amendment claims, including those involving strip searches. *See, e.g.*, *Oliver* v. *Scott*, 276 F.3d 736, 745-46 (5th Cir. 2002) (applying *Turner* and upholding strip search policy against Fourth Amendment challenge); *Hayes* v. *Marriott*, 70 F.3d 1144, 1146-48 (10th Cir. 1995) (applying *Turner* to strip searches alleged to violate Fourth Amendment); *Covino* v. *Patrissi*, 967 F.2d 73, 77-79 (2d Cir. 1992) (upholding under *Turner* a visual body cavity search alleged to violate the Fourth Amendment); *Cornwell* v. *Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992) (applying *Turner* and finding that Fourth Amendment claim regarding strip searches conducted outdoors in front of guards of the opposite sex presented triable issues of fact).

decision below were these facts presented. See Pet. 14-15 n.1. For instance, in *Mary Beth G.* v. *City of Chicago*, the policy found to violate the Fourth Amendment subjected *only women* arrested for misdemeanors to a "strip search and a visual inspection of their body cavities" upon admission. 723 F.2d 1263, 1266 (7th Cir. 1983). Men arrested for the same offenses could be strip searched "only if [officers] had reason to believe that the detainee was concealing weapons or contraband." *Id.* at 1268. *Mary Beth G.* therefore does not address the question posed here, whether the Fourth Amendment is violated when *all* inmates are subjected to search as a matter of policy.

Similarly, in *Jones* v. *Edwards*, the court did not address the constitutionality of a *policy* of strip searches upon admission at all. 770 F.2d 739 (8th Cir. 1985). Rather, the court held, based on the peculiar facts of the case, that the strip search of a misdemeanor arrestee at the time of admission violated the Fourth Amendment. The court concluded that the search in question failed *Bell*'s first prong (the need for the search) because "[o]fficers were with [the arrestee] every moment after they read him the warrant; they watched him dress and go to the bathroom, thereby eliminating any chance that he might have secreted a weapon on his person." *Id.* at 741; see *id.* at 740-41 (rejecting defendants' argument that the search was justified by the arrestee's "loud and abusive" and "increasingly profane" conduct).

For all these reasons, this Court should allow lower courts the fullest opportunity to resolve similar Fourth Amendment claims if they are squarely presented and under the correct standard of review set forth in *Turner*.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Contrary to petitioner's contention, there is no conflict between the decision below and this Court's Fourth Amendment decisions. See Pet. 16-30. Petitioner's effort to conjure a divide between the rule the court below adopted and this Court's cases is nothing more than a re-characterization of the above-discussed circuit cases that nominally side with his view of the Fourth Amendment.

Petitioner faults the court below for failing to adopt a rule that there must be "individualized suspicion" unique to a particular inmate arrested for a non-indictable offense. Pet. 18, 19, 20, 22, 32; see also *id.* 14-15 n.1, 16 (same argument based on circuit decisions adopting this rule). But petitioner cannot locate such a requirement in *Bell* or any other decision of this Court involving searches of inmates. As the court below correctly recognized, "*Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates at MCC." App. 22a; see *id.* at 22a n.8; *accord Bull*, 595 F.3d at 974, 978; *id.* at 983 (Kozinski, J., concurring) (collecting cases); *Powell*, 541 F.3d at 1307.[4] Indeed, in affirming a policy requiring random drug testing of

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[4] Instead, petitioner suggests (at 18-19) that such a requirement is dictated by *Safford Unified School District No. 1* v. *Redding*, 129 S. Ct. 2633 (2009) (strip searches of school children, not inmates), *Chandler* v. *Miller*, 520 U.S. 305 (1997) (drug testing of political candidates), *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989) (drug and alcohol testing of railway workers involved in train accidents and who violate safety rules), and the seminal decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968).

all athletes without requiring any particularized suspicion, this Court confirmed that "*Bell* v. *Wolfish* [citation] displays no stronger preference for individualized suspicion than we do today." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 664 n.3 (1995). The decision below does not conflict with this Court's Fourth Amendment case law. It was consistent with and dictated by *Bell*, to say nothing of *Turner*.

III. THIS CASE IS AN EXTRAORDINARILY POOR VEHICLE FOR REVIEW.

While petitioner's claims that there are conflicts that require this Court's immediate intervention are strained, his assertions that this case is "the ideal vehicle" in which to address the question presented are just wrong. Pet. 13, 31. The posture of this appeal, the facts concerning the searches to which petitioner alleges he was subjected, the respondents' changes to their policies, and the legal approach of the court below all would complicate this Court's review.

1. Petitioner seeks review of an interlocutory decision in which the Third Circuit resolved just one of his many civil rights claims. See *supra* at 4 n.2 (noting other claims); *id.* at 7 (Third Circuit reviewed a certified question). After entering summary judgment on the Fourth Amendment claims implicated here, the Third Circuit remanded for further proceedings, which remain ongoing in the district court. *Id.* at 8. This posture alone is reason enough to deny review. See, *e.g.*, *Bhd. of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Am. Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893). After a final judgment, this Court could review the Fourth Amendment issues presented here should subsequent developments in the circuits so

warrant. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam).

2. This case inherently is fact-bound because any alleged strip search of petitioner at ECCF is unique among the circuit cases petitioner identifies. Specifically, ECCF personnel searched petitioner *after* he had been housed at BCJ for six days. App. 3a. While at BCJ, he was in contact with a range of offenders and had special opportunities to obtain and hide contraband. See *Overton* v. *Bazzetta*, 539 U.S. 126, 134 (2003) ("Drug smuggling and drug use in prison are intractable problems."); *Bell*, 441 U.S. at 559 ("[a] detention facility is a unique place fraught with serious security dangers" and smuggling of contraband is "all too common"); see also App. 20a (recognizing the dangers of New Jersey jails related to gang activity); CA3 App. 211-212, 225 (gang activity in Burlington County).

None of the cases petitioner relies upon as evidence of a circuit split involves a search following transfer from one correctional facility to another. Compare *Jackson* v. *Herrington*, 393 F. App'x 348, 355 (6th Cir. 2010) (per curiam) (policy of strip searching all inmates upon transfer from one correctional facility to another did not violate the Fourth Amendment), *cert. denied*, No. 10-7711, 2011 WL 589095 (Feb. 22, 2011). Therefore, the analysis of the reasonableness of ECCF's alleged search that petitioner asserts is required (*e.g.*, Pet. 13, 18-19) would not be susceptible to broad application. See generally *Pearson* v. *Callahan*, 129 S. Ct. 808, 819 (2009) (endorsing First Circuit's acknowledgement that "'the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent

on the facts'"); *California* v. *Carney*, 471 U.S. 386, 396 (1985) (Stevens, J., dissenting) (Fourth Amendment cases "burden[] the argument docket" and "present[] fact-bound errors of minimal significance"); *Bull*, 595 F.3d at 996 (Thomas, J., dissenting) (suggesting that "the Fourth Amendment reasonableness inquiry is factbound" by definition).

3. Aside from the post-transfer nature of the alleged ECCF search, the district court and the Third Circuit recognized that factual disputes exist about the respondents' policies and how such policies were applied to petitioner.[5] Despite the seemingly one-size-fits-all question presented, see Pet. i, and that the cross-motions for summary judgment were filed after certification of a class that pursued "only ... strip search claims" but not claims that class-members "w[ere] subjected to a visual body cavity search," App. 5a n.1, petitioner now seeks to inject petitioner-specific and fact-heavy claims into the case. See Pet. 20-21 & n.5 (arguing that petitioner was subjected to a specially intrusive search and suggesting that he was subjected to visual body cavity searches while in view of other inmates).

Assuming *arguendo* that (i) petitioner retained Fourth Amendment rights while incarcerated,[6] and

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[5] *See, e.g.*, App. 5a-6a ("the District court concluded that ... there were facts in dispute—such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search"); *id.* at 64a-65a; *id.* at 66a ("Essex apparently seeks to raise a question of fact as to whether the strip searches even occurred."); *supra* at 2-4 & n.1.

[6] *See Bell*, 441 U.S. at 558 (assuming without deciding that the Fourth Amendment applied to searches of inmates); App. 19a (same, but "noting that that under *Hudson* v. *Palmer*, 468 U.S. 517 (1984), "'prisoners do not have a Fourth Amendment right to privacy in their cells'").

(ii) the *Bell* balancing test, not *Turner*, controls here, but see *supra* at 10-11, these unsettled fact issues are significant and potentially outcome determinative. As petitioner acknowledges, under *Bell*, "'the scope of the particular intrusion, the manner in which it is conducted ... and the place in which it is conducted'" are essential to the Fourth Amendment analysis. Pet. 9 (quoting *Bell*, 441 U.S. at 559); see *id.* at 31 (acknowledging the relevance of "[t]he underlying facts, including the scope and *application* of the jails' policies and practices") (emphasis added). Accordingly, any argument that the specific facts of the searches at issue do not make this a poor vehicle is specious given petitioner's own theory of the case. Compare *supra* at 9 (discussing *Jimenez* (5th Cir.), in which "'[t]he parties *agree*'" about the policies at issue) (emphasis added).

Indeed, depending on the resolution of the disputed facts underlying the alleged search at ECCF, it appears that at least one circuit whose rule petitioner characterizes as conflicting with the decision below also would reject his Fourth Amendment claim. Second Circuit law seemingly would foreclose his claim if—as ECCF personnel testified was consistent with their practice, see *supra* at 2-3 & n.1; App. 66a—officers merely saw petitioner's "genitals during a clothing exchange" in which he was not "subjected to [a] visual ... body cavity search" or "asked to manipulate his body in any way or to assume any particular position." *Kelsey* v. *Cnty. of Schoharie*, 567 F.3d 54, 63 (2d Cir. 2009); *id.* at 64-65; see also *Stanley* v. *Henson*, 337 F.3d 961, 965-67 (7th Cir. 2003) (clothing exchange during which inmate stripped and exposed her breasts to officer before receiving jail-issued clothing did not violate Fourth Amendment).

4. ECCF's policy today and the alleged requirements of New Jersey law diminish the importance of review. Petitioner admits (at 29) that ECCF's current policy does not permit "strip searching" all inmates upon intake, but instead specifies that "[n]ewly admitted inmates may be subjected to a strip search or body cavity search only in accordance with the conditions set forth in N.J.A.C. 10A:31-8." App. 152a; see also *id.* at 126a (current BCJ policy also requires "reasonable suspicion" to strip search non-indictable arrestees) (capitalization omitted). Moreover, although petitioner declined to plead any claims under New Jersey law, he argues that the New Jersey statute cited in ECCF's current policy categorically prohibits strip searches of non-indictable arrestees absent "at least reasonable suspicion that the individual possesses contraband." Pet. 4; *accord id.* at 29. Thus, because the type of searches alleged to violate the Fourth Amendment here are unlikely to recur at ECCF and because plaintiffs can seek relief under state law for any future violations of the assertedly more protective New Jersey laws governing searches, this case would not be an efficient use of this Court's limited resources.

5. Finally, the court below found that the searches at issue here were constitutional under *Bell* without addressing the more rigorous *Turner* analysis. A case subjecting a similar strip search policy to the *Turner* test would permit more meaningful review and more useful guidance for lower courts. See *supra* at 10-11.

For these many reasons, this case is far from an "ideal vehicle" for reviewing the question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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REPLY BRIEF

Supreme Court, U.S.
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No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

Like both of the lower courts, "[r]espondents acknowledge that there are divisions in the courts of appeals" over the constitutionality of policies requiring blanket strip searches of all those admitted to a jail or prison. Essex BIO 8. The conflict moreover is no mere disagreement about verbal formulations: "It is certainly true that Courts of Appeals have *come to different results* on the question of which searches may be conducted without individualized suspicion without offending the Fourth Amendment." Burlington BIO 10 (emphasis added). Nor do respondents dispute that the question, which arises on a daily basis in jails across the country, has profound importance for the preservation of individuals' most basic rights and the administration of correctional facilities throughout the nation. Respondents are accordingly reduced to arguing that *eight* different courts of appeals will reverse themselves without this Court's intervention, and that this case is a poor vehicle for resolving the circuit conflict. Because neither assertion has merit, certiorari should be granted.

I. The Broad And Deepening Circuit Conflict Over The Constitutionality Of Blanket Suspicionless Strip Search Policies Requires This Court's Intervention.

The lower courts correctly recognized that this case directly implicates an eight-to-three circuit split. There is no prospect that the conflict will resolve itself.

1. Respondents' effort to pick around the edges of this well-recognized circuit conflict lacks merit.

Although Essex notes that *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), involved searches of women, that fact had no bearing on the analysis of the Seventh Circuit, which has subsequently applied *Mary Beth* to the strip search of a man, *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007). Likewise, nothing in the Eighth Circuit's decision in *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985), provides any basis for Essex's odd suggestion (BIO 12) that the strip search in that case would have been upheld if the jail had only extended its unconstitutional practice to all arrestees.

The cases cited by Burlington (BIO 10) in claiming that some courts "have upheld practices very similar to the ones reviewed by the Court of Appeals here" are all in fact easily distinguishable: most involve significantly less intrusive searches,[1] and the rest arise in materially different contexts.[2] Critically, respondents omit that every one of the

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[1] *See Kelsey v. County of Schoharie*, 567 F.3d 54, 63 (2d Cir. 2009) (clothing exchange in which inmate allowed to conceal self behind towel and low wall); *Stanley v. Henson*, 337 F.3d 961, 966 (7th Cir. 2003) (clothing exchange policy that allowed inmates to retain underwear); *Schmidt v. City of Bella Villa*, 557 F.3d 564, 567-68, 572-74 (8th Cir. 2009) (suspect who gave false name required to unzip pants to allow photograph of tattoo "approximately two inches from [her] hipbone").

[2] *See Dobrowolskyj v. Jefferson County, Ky.*, 823 F.2d 955, 956 (6th Cir. 1987) (suspect charged with menacing subjected to strip search for weapons upon movement into higher security part of jail); *N.G. v. Connecticut*, 382 F.3d 225, 233, 237 (2d Cir. 2004 (strip search upon admission to juvenile facility upheld in light of special circumstance surrounding detention of children).

cases they cite expressly reaffirms circuit precedent prohibiting blanket strip searches of all adult arrestees.[3]

2. Unable to deny persuasively that the petition directly presents a broad and recurring circuit conflict, respondents instead argue simultaneously that the question has been percolating in the lower courts too long and not long enough to warrant this Court's review.

Although some circuits forbade blanket strip search policies before this Court decided *Turner v. Safley*, 482 U.S. 78 (1987), *see* Essex BIO 10-11, *Turner* would not change the result. Respondents admit that in the twenty-four years since *Turner* was decided, only one circuit has reversed course in light of that decision. *See* Essex BIO 11. The eight circuits adopting the majority view do not accept that "*Turner* implicitly overruled" their prior circuit precedent. *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001). They accordingly have repeatedly applied or reaffirmed circuit precedent after *Turner*.[4] Indeed, even circuits

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[3] *See Dobrowolskyj*, 823 F.3d at 957; *Kelsey*, 567 F.3d at 62; *Schmidt*, 557 F.3d at 572; *N.G.*, 382 F.3d at 232; *Stanley*, 337 F.3d at 965.

[4] *See Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997); *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008); *Shain*, 273 F.3d at 65; *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988); *Amaechi v. West*, 237 F.3d 356, 364-65 (4th Cir. 2001); *Abshire v. Walls*, 830 F.2d 1277, 1279-80 (4th Cir. 1987); *Isbell v. Ray*, No. 98-6377, 2000 WL 282463, at *8 (6th Cir. Mar. 8, 2000) (unpublished); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Campbell*, 499 F.3d at 717; *McCabe v. Parker*, 608 F.3d 1068,

allowing blanket strip searches have declined to rely on *Turner*. *See* Pet. App. 18a n.5; *Powell v. Barrett*, 541 F.3d 1298, 1302-03 (11th Cir. 2008) (en banc). If *Turner* has not resolved the circuit conflict by now, it never will.

Alternatively, respondents assert that "the circuits are capable of resolving any meaningful conflict" themselves. Essex BIO 8. Although two circuits have reversed themselves en banc and the question is now pending before one other en banc court (*id.* at 9), there is no prospect that all of the eight circuits in the majority (but none of the three in the minority) will both take up the issue en banc and reverse course. Respondents fail to acknowledge that since the circuit conflict emerged in 2008, circuits in the majority have repeatedly reaffirmed their positions. *See, e.g.*, *Myers v. James*, 344 Fed. App'x 457, 460 (10th Cir. 2009) (unpublished) (expressly refusing to reconsider circuit precedent in light of Eleventh Circuit's contrary en banc decision), *cert. denied*, 130 S. Ct. 1735 (2010); *see also McCabe*, 608 F.3d at 1073 n.4; *United States v. Jones*, 341 Fed. App'x 176, 177-78 (7th Cir. 2009) (unpublished); *Hartline*, 546 F.3d at 100; *Archuleta*, 523 F.3d at 1284, 1286.

The recent decisions tread no new ground. They simply disagree with their sister circuits over the

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1073 n.4 (8th Cir. 2010); *Archuleta v. Wagner*, 523 F.3d 1278, 1284, 1286 (10th Cir. 2008); *Ellis v. Sharp*, No. 93-6242, 1994 WL 408129, at *2 (10th Cir. Aug. 4, 1994) (unpublished); *Cottrell v. Kaysville City, Ut.*, 994 F.2d 730, 734 (10th Cir. 1993); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993).

best reading and implementation of this Court's decisions – particularly *Bell v. Wolfish*, 441 U.S. 520 (1979) – a disagreement that only this Court can resolve. *See* Pet. App. 17a-28a; *Powell*, 541 F.3d at 1303-08; *Bull v. City & Cnty of San Francisco*, 595 F.3d 964, 971-77 (9th Cir. 2010) (en banc).

II. This Case Presents An Ideal Vehicle For Resolving The Circuit Conflict.

This case presents an ideal vehicle to resolve the entrenched circuit conflict. The court of appeals squarely decided the question presented by the petition on the basis of a well-developed record that puts the constitutional question in stark relief. Respondents do not claim that they had any basis to suspect that petitioner was concealing weapons or contraband in his underwear when he was unexpectedly arrested on an invalid warrant during an unanticipated traffic stop. Respondents therefore defend their conduct, as they must, by claiming that the Fourth Amendment permits suspicionless strip searches of every arrestee admitted to the general population of a jail. *See* Burlington BIO 18; Essex BIO 13-14. That is precisely the claim that has been rejected by eight circuits and accepted by three.

By contrast, the only previous certiorari petition to attempt to raise the circuit conflict, No. 09-451, *Saulsberry v. Myers*, *cert. denied*, 130 S. Ct. 1735 (2010), was an exceptionally poor vehicle. Because the individual in *Saulsberry* was held in a "detox cell" for four hours without ever being introduced into the general population, *see* BIO, No. 09-451, at 11-12; *Myers v. James*, 344 Fed. App'x 457, 458-59 (10th Cir. 2009) (unpublished), the case did not implicate the

principal justification asserted for the strip searches at issue here: the need to prevent introduction of weapons and contraband into a jail's general population.

Respondents make no such claim here and their other objections to this case as an appropriate vehicle for resolving the circuit conflict do not withstand scrutiny.

First, although this is formally an interlocutory appeal, *see* Essex BIO 9; Burlington BIO 14, the relevant point is that the Fourth Amendment question in the case has been finally decided. The pending district court proceedings will have no bearing on petitioner's strip search claims, which were conclusively resolved by the Third Circuit's decision. Respondents do not even attempt to suggest that a trial on petitioner's false arrest and conditions of confinement claims would shed any further light on the question presented by the petition.

In similar circumstances, when waiting for final judgment would serve no purpose, this Court has not hesitated to grant certiorari to review an interlocutory appeal. *See generally* Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) (noting that certiorari may be granted "to review a nonfinal judgment where there is a conflict on a question of law with another court of appeals . . . , that would justify review of a final decree or judgment"); *see also, e.g.*, *Sossamon v. Texas*, 130 S. Ct. 3319 (2010) (granting interlocutory petition); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010) (deciding case on

interlocutory appeal); *Forest Grove School Dist. v. T.A.*, 129 S. Ct. 2484, 2490 (2009) (same).

Second, Essex argues that there is a factual dispute whether petitioner was subject to a "visual body cavity search," Essex BIO 16, by being required to "lift his genitals" and "squat and cough" in front of prison officials, *id.* at 3-4, n.1, 16 n.5. But as the court of appeals explained (Pet. App. 6a), "the District Court concluded that, while there were facts in dispute – such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search – these disputes were immaterial" to the question decided by the courts below and posed by this petition: whether the Fourth Amendment permits a jail policy requiring all "arrestees to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower." Pet. App. 19a. And in the court of appeals, the "Jails d[id] not challenge the District Court's factual findings regarding the scope of the strip search policies." *Id.* at 6a n.3.[5]

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[5] Respondents imply that there is a genuine factual dispute as to whether petitioner was even strip-searched at all. Essex BIO 2-4 & n.1, 16 & n.5; Burlington BIO 4. But the district court easily and correctly rejected that claim. It found that Burlington's attempt to draw a verbal distinction between a "strip search" and "visual inspection" was "of no consequence" to the constitutional question. Pet. App. 65a. And it directly rejected Essex's attempt to "raise a question of fact as to whether the strip searches even occurred," finding that "there is no genuine issue of material fact to prevent summary judgment in favor of Plaintiffs." Pet. App. 66a-67a.

Third, Essex argues that petitioner's transfer to its facility from another jail is a factual complication that counsels against review. Essex BIO 15. But that is a compelling reason to *grant* review in this case, as it will allow the Court to provide much needed guidance in the two most common circumstances in which jails conduct searches: admission from the street and admission from another facility. *Compare, e.g.*, Pet. App. 28a (permitting suspicionless strip searches in both contexts) *with N.G.*, 382 F.3d at 233-34 ("Whatever the justification for strip searches upon initial admission to a first detention facility, we see no state interest sufficient to warrant repeated strip searches simply because of transfers to other facilities."); *id.* at 238 (Sotomayor, J., concurring in part and dissenting in part) (same).

Fourth, Burlington suggests that this case is a poor vehicle because the Third Circuit did not pass on Burlington's assertion that blanket strip searches were justified to identify gang members and detect disease. BIO 18-19. Nothing prevents respondents from raising those arguments in this Court on the merits, but they do not seriously contribute to the legal inquiry. Respondents cannot substantiate any claim that gang members regularly tattoo themselves in places hidden by their underwear, where the tattoo cannot serve its purpose of telegraphing gang affiliation to others. And petitioner has raised no objection to requiring arrestees to disrobe for examinations by medical personnel, a process which entails a far lesser infringement on privacy than strip searches by correctional officers. *See* Pet. 17.

Finally, respondents argue that review is not required because blanket suspicionless strip searches are already prohibited by present jail policy and state law. Essex BIO 18; Burlington BIO 22. But petitioner's claim for damages obviously is not moot, and the legal issue continues to arise around the country. Further, as the facts of this case demonstrate, state law and jail policies have shown themselves to be entirely ineffective at protecting New Jersey residents from unconstitutional strip searches. *See* Pet. 4-5. Moreover, even today, Essex cannot bring itself to admit that suspicionless strip searches are illegal, acknowledging only the "*alleged* requirements of New Jersey law." BIO 18 (emphasis added). And Burlington has argued all along that requiring inmates to strip nude for visual examination by corrections officers does not constitute a "strip search." *See* Pet. App. 64a-65a.[6]

III. Respondents' Policies Violated The Fourth Amendment.

The ruling below conflicts with this Court's precedents and with basic Fourth Amendment principles. Respondents cannot dispute that a strip search represents a dramatic intrusion upon personal privacy. The question in most Fourth Amendment cases is the reasonableness of the government entering or viewing spaces – such as a residence or a vehicle – that are not in fact exclusively private, as

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[6] Respondents' recalcitrance flies in the face of the plain text of N.J. Admin. Code § 10A:31-8.4. *See* Pet. 4; Pet. App. 95a-97a (rejecting respondents' claim that search was authorized by state regulations).

individuals will otherwise open them to friends and families. But a strip search is a vastly greater intrusion upon personal privacy and (equally important) individual dignity: forcibly depriving the individual of all his clothes exposes to view parts of our bodies that will otherwise be seen only by intimate partners and medical professionals, and moreover does so under a humiliating command by jail officials that necessarily implies a judgment that the individual is a common and dangerous criminal.

A strip search accordingly stands "in a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Absent special justification, it is subject to "the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997). As the petition explained but respondents conspicuously ignore, it is well-settled that sufficient individualized suspicion in the context of admission to a jail can arise from either the nature of the offense (such as a crime involving violence, weapons, or drugs) or the individual's own personal history of involvement in such dangerous activities. *See* Pet. 19-20. Jails also may require all arrestees to strip to their underwear and submit to pat downs, metal detectors, and body scanners. Given this array of tools to combat smuggling, it is unnecessary to strip search each and every jail admittee. *Id.* at 21-22. That is not mere speculation: categorical strip search policies have long been forbidden in most of the country, New Jersey itself bans them, and the federal Bureau of Prisons does as well. *See* Pet. 28-30. In this case, petitioner was arrested for failing to pay a fine, has

no history of violence or drug use, and obviously was not attempting to smuggle anything into jail because he constantly (and correctly) protested that he should not be arrested in the first place. Forcibly strip searching him – twice – was not "reasonable."

The petition explained that the Third Circuit and respondents err in their contrary reliance on *Bell v. Wolfish*, 441 U.S. 520 (1979). *See* Pet. 22-30. That case held that a strip search was reasonable "under the circumstances" in which prison inmates could *coordinate* smuggling through contact visits that were not closely supervised by jail personnel. 441 U.S. at 558. Further, the detainees in *Bell* made the voluntary decision to subject themselves to the searches in that case. This Court did not announce a categorical rule authorizing strip searches in jails but recognized the fact-specific nature of the inquiry, which "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. Respondents do not seriously dispute that the admission into jail of persons such as petitioner – who was arrested without notice, and who pleaded not to be taken to jail – does not give rise to the same governmental interest in preventing smuggling.

Respondents equally err in their reliance on other precedents – such as *Turner v. Safley*, 482 U.S. 78 (1987) – involving the Constitution's application to prisons. Even if applicable here, those decisions do not grant prison officials *carte blanche*. Prison regulations must be "reasonably related to legitimate penological objectives," rather than an "exaggerated response." *Turner*, 482 U.S. at 87 (internal quotation marks omitted). Accordingly, the constitutionality of

such measures turns on whether officials "show[] more than simply a logical relation, that is, whether [they] show[] a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion). Here, respondents have failed to prove any reasonable relationship between a categorical policy of strip searching all admittees regardless of the circumstances and the needs of jail administration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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March 9, 2011

JOINT APPENDIX

RECORD

No. 10-945

JUN 20 2011

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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48a - District Court Summary Judgment Decision dated June 30, 2009

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APPENDIX A — RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT, DISTRICT OF NEW JERSEY

07/19/05	U.S. District Court, District of New Jersey	Complaint filed
09/15/05	U.S. District Court	Essex County Answer to Complaint
06/14/06	U.S. District Court	Order granting Motion to Amend Complaint
06/30/06	U.S. District Court	Amended complaint filed
07/11/06	U.S. District Court	Burlington County Answer to Amended Complaint
07/13/06	U.S. District Court	Essex County Answer to Amended Complaint
8/01/07	U.S. District Court	Brief supporting Motion to Certify Class
8/01/07	U.S. District Court	Certification on behalf of Albert W. Florence re: Motion to Certify Class

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8/01/07	U.S. District Court	Exhibit to Motion to Certify Class
8/02/07	U.S. District Court	Motion to certify class
9/05/07	U.S. District Court	Board of Chosen Freeholders of the County of Burlington et al.'s Appendix in opposition to motion to certify class
9/10/07	U.S. District Court	Board of Chosen Freeholders of the County of Burlington et al.'s Appendix in opposition to motion to certify class
9/12/07	U.S. District Court	Essex County Correctional Facility et al.'s Brief in opposition to class certification
9/12/07	U.S. District Court	Board of Chosen Freeholders of the County of Burlington et al.'s Brief in opposition to class certification
9/19/07	U.S. District Court	Reply in support of class certification
03/20/08	U.S. District Court	Order And Opinion Granting Plaintiff's Motion to Certify Class

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05/05/08	U.S. District Court	Order Denying Motion for Reconsideration of Class Definition
06/28/08	U.S. District Court	Florence Motion for Summary Judgment
08/20/08	U.S. District Court	Burlington County Cross Motion for Summary Judgment
08/20/08	U.S. District Court	Essex County Motion to Dismiss/for Summary Judgment
09/22/08	U.S. District Court	Florence Brief in Opposition to Cross Motion for Summary Judgment
09/22/08	U.S. District Court	Florence Brief in Opposition to Motion to Dismiss
09/26/08	U.S. District Court	Essex County Brief in Opposition to Motion for Summary Judgment
09/29/08	U.S. District Court	Burlington Brief in Opposition to Motion for Summary Judgment

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11/10/08	U.S. District Court	Motion Hearing Held Regarding Plaintiff's Motion for Summary Judgment, Essex Cross-Motion To Dismiss Complaint, Burlington Cross-Motion for Summary Judgment
2/4/09	U.S. District Court	Opinion and Order Granting Plaintiffs' Motion for Summary Judgment on Issue of Law of Whether Strip Searches Are Unconstitutional and Denying Defendants' Cross-Motion for Summary Judgment
02/13/09	U.S. District Court	Essex County Motion to Amend Summary Judgment Order
02/20/09	U.S. District Court	Burlington County Motion to Amend Summary Judgment Order
03/23/09	U.S. District Court	Florence Brief in Opposition to Motion to Amend
04/02/09	U.S. District Court	Essex County Reply Brief in Support of Motion to Amend
04/14/09	U.S. District Court	Burlington County Reply Brief in Support of Motion to Amend

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06/30/09	U.S. District Court	Opinion and Order Amending Opinion of February 4, 2009, To Certify Question to the United States Court of Appeals for the Third Circuit

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

08/26/09	U.S. Court of Appeals for the Third Circuit	Order Granting Petitions for Permission to Appeal
04/15/10	U.S. Court of Appeals	Oral argument held
10/21/10	U.S. Court of Appeals	Opinion and Judgment Reversing and Remanding

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED MARCH 20, 2008

[1] NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Hon. Joseph H. Rodriguez

Civil Action No. 05-3619

OPINION & ORDER

ALBERT W. FLORENCE,

Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

RODRIGUEZ, Senior District Judge:

Plaintiff Albert Florence ("Florence" or "Plaintiff") initiated this action primarily to seek redress for allegedly being subjected to two unlawful strip searches while in the custody of the Burlington County Jail ("Burlington

Jail") and the Essex County Correctional Facility ("Essex Jail"). To this end, he filed a Complaint in which he named as Defendants: (1) the Board of Chosen Freeholders of Burlington County, the Burlington Jail, its warden, and several John Doe Burlington Jail officers (collectively "Burlington County Defendants"); and (2) the Essex Jail, the Essex County Sheriff's Department, and several John Doe Essex Jail officers (collectively "Essex County Defendants"). After receiving leave of the Court, Florence filed an Amended Complaint in which he added class action allegations relating to what he claims is Defendants' "policy and practice of subjecting arrestees to blanket strip searches without any individualized finding of [2] reasonable suspicion, or probable cause . . . ." (Am. Compl., ¶ 42.) Presently before the Court is Plaintiff's motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for certification of his proposed class [73]. For the reasons that follow, the Court will grant the motion.

I. BACKGROUND

A. Facts Relating to Plaintiff's Arrest, Detention, and Alleged Strip Searches

On March 3, 2005, Plaintiff was a passenger in his sport utility vehicle, which was being driven by his wife on Interstate Highway 295 in Burlington County. (Am. Compl., ¶¶ 13-14.) The vehicle was stopped by a New Jersey State Trooper, who directed Florence to exit the passenger compartment and arrested him based on an Essex County bench warrant that was issued on April 25, 2003. (Pl. Br., p. 1.) Plaintiff contends that this warrant

charged him with a form of civil contempt that is not an indictable offense.[1] (*Id.*, p. 2.) In fact, the warrant related to a fine which Plaintiff had already paid. (*Id.*, p. 2.) Although Florence protested the warrant's validity, he was taken by the State Trooper to the Burlington Jail. (Am. Compl., ¶¶ 15, 17.)

Once at the Burlington Jail, Plaintiff was subjected to what he alleges was a full strip and body cavity search.[2] (*Id.*, ¶ 17.) According to Florence's deposition testimony, [3] an officer directed him to remove all his clothing and, while nude, he was told to open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals. (Pl. Exh. D, 70:23-71:9.) Plaintiff complied with these requests while the officer sat about an arm's length in front of him. (*Id.*, 213:16-18.) The officer then instructed Florence to shower. (*Id.*, 72:4.) Thereafter, Plaintiff was held at the Burlington Jail for six days. (Am. Compl., ¶ 17.)

After the sixth day, the Essex County Sheriff's Department collected Plaintiff and transported him to the Essex Jail. (*Id.*, ¶ 26.) Upon his arrival there, Florence was processed and again subjected to what he alleges

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1. The nature of the offense with which Plaintiff was charged is a critical issue at this state of the litigation and will be discussed in detail in section II.A.3, *infra*, of this Opinion & Order.

2. Although it is not binding on this Court for the purpose of determining the constitutionality of an alleged strip search, it is instructive to note that New Jersey law defines a [3] strip search as "the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts." N.J. Sta. Ann. § 2A:161A-3.

was a full strip and body cavity search. (*Id.*) According to Plaintiff's deposition testimony, Essex Jail officers told him and four other arrestees to enter separate shower stalls, strip off all their clothing, and shower. (Pl. Exh. D, 128:8-12.) Plaintiff and the other arrestees complied by removing their clothes while two officers watched. (*Id.*, 215:22-216:11.) Plaintiff then showered, during which he was directed to open his mouth and lift his genitals. (*Id.*, 128:23-129:9.) He was then ordered to turn around so that he faced away from the officers, after which he was told to squat and cough, and then to turn back around to face front. (*Id.*, 129:9-15.) Following this episode, Florence was placed with the general jail population until the next day when the charges against him were dismissed. (Am. Compl., ¶ 29.) [4]

B. Evidence in the Record

Plaintiff attached to his moving papers several documents and deposition transcripts relating to Defendants' intake policies and procedures. The Court will briefly summarize some of this evidence as it relates directly to Plaintiff's class action allegations.

1. Burlington Jail's Procedures

The Burlington Jail's inmate searching procedures are based on a document entitled "Policies and Procedures: Search of Inmates – No. Section 1186" (hereinafter "Section 1186"). (*See* Pl. Exh. L.) Section 1186 defines a strip search as "a physical search of an inmate . . . while unclothed consisting of routine and systematic visual

observation of the inmate's physical body to look for distinguished identifying marks, scars or deformities, signs of illness, injury or disease and/or the concealment of contraband on the inmate's body." (*Id.*, p. 1.) The document also provides that "[a] person who has been detained or arrested for commission of an offense other than a crime[3] . . . shall not be subject to a strip-search unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found." (*Id.*, p. 2.)

Several Burlington Jail officers and its warden testified in depositions about these procedures. Lieutenant Douglas Chilton has worked for the Burlington Jail since 1997. He executed a document related to Plaintiff's alleged strip search entitled "Strip Search [5] Authorization Form." (*See* Pl. Exh. N.) This form indicates that Plaintiff was not strip searched. (*Id.*) During Lieutenant Chilton's deposition, he explained that arrestees who are brought in for non-indictable offenses are subjected to a "visual observation," while those admitted for indictable offenses are strip searched. (Pl. Exh. J, 12:3-5.) He further explained that Florence's Strip Search Authorization Form was marked "not strip searched" because he was admitted for a "failure to appear," which is a non-indictable offense, and which mandates only a visual observation during intake. (*Id.*, 24:15-25:2.)

Officer Haywood Reeder has worked at the Burlington Jail since 1990. He, too, confirmed that arrestees admitted

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3. Under New Jersey law, offenses other than crimes do not require indictment by a grand jury. *See* N.J. Stat. Ann. § 2C:1-4(b). In other words, such offenses are "non-indictable."

for non-indictable offenses, such as civil contempt, should not be strip searched. (Pl. Exh. F, 13:8; 13:18-14:2.) Relatedly, he defined a strip search as searching various parts of a nude inmate's body for contraband, scars, marks, or tattoos. (*Id.*, 14:3-10, 19:6-9.) By contrast, all inmates, irrespective of whether they are indictable or non-indictable, are subjected to a visual observation. (*Id.*, 17:14-19, 27:1-7.) According to Officer Reeder, a visual observation includes checking a nude arrestee for scars, marks, and tattoos while he strips for a mandatory shower, instructing the nude arrestee on the application of a delousing agent, then instructing the nude arrestee to change into jail clothing following his shower. (*Id.*, 14:20-15:10, 16:10-18:22, 23:7-10, 26:16-20.)

Officer Charles Palmer has worked for the Burlington Jail since 2000. He also explained that arrestees admitted for non-indictable offenses are subjected to a visual [6] observation. (Pl. Exh. G, 5:24-6:7.) Officer Palmer further testified that a visual observation involves taking an inmate into the shower area, having them remove all their clothing, directing them to turn around while nude so the officer can look for bruises and distinguishing marks, and then having the inmate take a shower. (*Id.*, 6:10-18, 8:8-14, 9:14-10:24, 12:24-13:12.) According to Officer Palmer, the difference between a visual observation and a strip search is that, with the latter, officers direct arrestees to spread their buttocks and/or lift their genitals. (*Id.*, 23:8-14.) However, he also acknowledged that he has found genital piercings and tattoos during visual observations, (*id.*, 13:13-20,) which suggests there is at least some examination of the genitals during a visual observation.

Appendix B

Officer Sean Gallagher has worked for the Burlington Jail since 1996. He, like the other officers, testified that non-indictable arrestees, such as those arrested for civil contempt, are subjected to a visual observation. (Pl. Exh. H, 19:22; 19:25-20:7.) Moreover, he explained that a visual observation entails taking the arrestee to a shower room, having him remove his clothing and turn around while the officer looks at the arrestee's nude body to check for scars, marks, tattoos, and body vermin, before finally instructing the arrestee to shower with a delousing agent. (*Id.*, 11:9-15, 12:3-18, 13:4-24, 19:22-24, 32:24-33:5, 54:4-12.) During these visual observations, Officer Gallagher directs inmates with hanging genitalia to lift their genitals in order to look for contraband, scars, marks, and tattoos. (*Id.*, 15:14-25.) When asked how this differed from a strip [7] search, Officer Gallagher explained that strip searches are "a little more thorough," and involve having the inmate bend over and spread his buttocks so the officer can "get a view of their anus to see if there is anything that would be suspicious looking . . . ." (*Id.*, 18:22-19:3.) In any event, Officer Gallagher acknowledged that all arrestees, whether indictable or non-indictable, are required to take off their clothing while the officer visually observes them and has them turn around. (*Id.*, 54:4-12.) According to Officer Gallagher, this is required by the Burlington Jail's custom and practice, which every corrections officer follows. (*Id.*, 54:13-25.)

Lieutenant Jerry Coleman has worked at the Burlington Jail since 1990. He explained that arrestees who are not indictable are subjected to a visual observation as part of the intake process. (Pl. Exh. I, 11:12-14.)

According to Lieutenant Coleman, a visual observation involves a corrections officer taking the arrestee to a shower room where he directs the arrestee to remove his clothing and turn around while the officer checks the arrestee's front and back for deformities, bruises, marks, tattoos, and puncture wounds. (*Id.*, 11:9-21, 22:12-19, 24:1-21, 30:15-18.) Lieutenant Coleman also drew a distinction between a visual observation and a strip search, claiming that the latter requires arrestees to bend down, squat, and lift their genitals. (*Id.*, 30:23-24.)

Juel Cole has worked at the Burlington Jail since 1976 and has been its warden since 1997. Like the officers, Warden Cole confirmed that an arrestee admitted for a non-indictable offense is subjected to a visual observation, which involves an officer [8] "mak[ing] a quick check" on a nude inmate while he changes clothing or during his shower for bruises, tattoos, or "any item like that of any importance." (Pl. Exh. K, 25:10-26:2.) Sometimes, though apparently not always, the officer conducting the visual observation will direct the nude arrestee to turn around to facilitate a full check of the arrestee's entire body. (*Id.*, 26:3-13.) Interestingly, Warden Cole acknowledged that if he directed an inmate to remove his clothing, he would be telling the inmate to strip. (*Id.*, 31:7-10.) However, according to Warden Cole, a visual observation of an arrestee's nude body does not constitute a "search" under the Burlington Jail's definition of that term. (*Id.*, 31:11-16.)

2. Essex Jail's Production

The Essex Jail's inmate searching procedures during the proposed class period are based on two documents: (1) a

document entitled "Department of Public Safety: General Order No. 89-17" (hereinafter "Order No. 89-17"); and (2) one called "Department of Corrections: Administrative Directive No. 04-06" (hereinafter "Directive No. 04-06").[4] Order No. 89-17 went into effect in September 2002 and provides that, upon arrival at the Essex Jail, all arrestees shall be strip searched and then required to shower. (*See* Calabro Cert., 8/2/07, Exh. D(1), p. 3, § V.A.2. & 3.) It further states that a strip search is to consist of having an arrestee undress completely. (*Id.*, p. 4, § V.B.) Officers are [9] supposed to "observe carefully while the inmate undresses." (*Id.*) Moreover, officers are to examine the interior of the arrestee's mouth; his or her ears, nose, hair and scalp; his or her fingers, hands, arms, and armpits; and all body openings and the inner thighs. (*See id.*)

Order No. 89-17 was superseded in April 2005 by Directive No. 04-06. The latter document provides that officers are required to "[c]onduct a thorough search of individual inmates[.]" (Calabro Cert., 8/2/07, Exh. D(2), p. 4, § VII.c.5.) It further directs officers to have all arrestees shower during intake. (*Id.*, p. 4, § VII.c.6.) Moreover, officers are required to "[o]bserve and document" any evidence of notable body markings; body vermin or disease; and sores, wounds, or other injuries. (*Id.*, p. 4, § VII.c.7.) In contrast with Order No. 89-17, Directive No. 04-06 facially prohibits strip searching non-indictable arrestees in the absence of reasonable suspicion that

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4. Order No. 89-17 and Directive No. 04-06 are both attached to as Exhibit D to an August 2, 2007 certification made by Michael Calabro, co-counsel for Plaintiff. For the sake of pagination-related clarity, the Court will cite Order No. 89-17 as Exhibit D(1) and Directive No. 04-06 as Exhibit D(2).

the search will produce a weapon, drugs, or contraband. (*See id.*, p. 4, § VII.c.8 (referring to the strip search procedures outlined in subchapter 10A:31-8 of the New Jersey Administrative Code).)

A number of Essex Jail officers and its warden testified concerning intake procedures at that facility. Sergeant Thomas Logue has worked for the Essex Jail since 2005 and was on intake duty on March 9, 2005, the night Plaintiff was booked. (Pl. Exh. O, 10:10-14.) He testified that, for intake processing purposes, all arrestees are treated the same as one another, without any distinction based on whether the arrestee is accused of an indictable or a non-indictable offense. (*Id.*, 13:23-14:11.) According to Sergeant [10] Logue, during processing, officers call up to three arrestees at a time to enter the shower area. (*Id.*, 19:21-23, 20:1, 21:16-18.) Once there, corrections officers direct the arrestees to remove their articles of clothing and place them into gray bins. (*Id.*, 22:2-9, 22:23-23:1, 23:7-10.) The arrestees then simultaneously undress completely while the officers view their nude bodies. (*Id.*, 23:2-6, 25:21-24, 33:22-34:5.) Toward the end of his testimony, Sergeant Logue repeated that the same intake procedures are conducted for all arrestees irrespective of the nature of the charged offence. (*Id.*, 34:6-16.)

Officer Richard Monroig has worked at the Essex Jail since 1995. Like Sergeant Logue, Officer Monroig testified that arrestees are never segregated based on the nature of their offense – *i.e.*, indictable versus non-indictable – during the intake process. (Pl. Exh. P, 9:21-10:1.) Indeed, Officer Monroig explained that processing officers are not

even trained as to which charges are indictable and which are not indictable. (*Id.*, 37:16-25.) According to Officer Monroig, as part of the intake process, arrestees are lead, three at a time, to a shower area where officers direct them to remove their clothing and shower. (*Id.*, 12:12-15, 13:12-15, 13:21-24, 13:25-14:2, 14:22, 15:10-14, 17:7-9.) The arrestees then take their clothes off and stand nude while an officer watches. (*Id.*, 16:3-5, 17:13-15, 21:15-18.)

Lieutenant Michael Salzano has worked for the Essex Jail since 1987. He works in the shower room daily and is very familiar with the Essex Jail's intake procedures. (Pl. Exh. Q, 6:13-16, 13:2-4.) These procedures include a mandatory shower. (*Id.*, 12:11-23.) [11] To this end, officers bring up to three arrestees into the shower room at a time, and direct them to remove their clothing and take a shower. (*Id.*, 18:1-5, 20:19-25.) Like Sergeant Logue, Lieutenant Salzano testified that this procedure is the same no matter whether the arrestee is admitted for an indictable or non-indictable offense. (*Id.*, 22:11-20, 32:13-19.)

Larry Glover has been the warden at the Essex Jail since 2004. He testified that arrestees are searched to ensure they have no contraband. (Pl. Exh. R, 24:8-10.) This process includes having as many as three arrestees enter the shower area and remove their clothing, which officers then search. (*Id.*, 24:15-17, 25:5-6.) The arrestees then shower and are directed to put on jail-issued clothing. (*Id.*, 24:20-22.)

C. Plaintiff's Class Action Allegations

Florence claims that the procedures described in the preceding paragraphs amount to strip searches even if, in the case of the Burlington Jail, the procedures involve a so-called "visual observation" or if, in the case of the Essex Jail, the written policy was recently revised to facially comply with New Jersey's strip searching rules. In fact, Plaintiff alleges that

> Defendants have instituted a written and/or de facto policy, custom, or practice of strip searching all individuals who enter the custody of their Correctional Facilities regardless of the nature of their charged crime and without the presence of reasonable suspicion to believe that the individual was concealing a weapon or contraband.

(Am. Compl., ¶ 58.) Thus, according to Plaintiff, each member of the class was the "victim[] of a blanket strip search upon [his] entry into Defendants' Correctional [12] Facilities." (*Id.* ¶ 64.) Moreover, Plaintiff asserts that Defendants' officers had no reasonable suspicion to support any of these alleged searches. (*Id.*, ¶ 67.) Thus, Florence maintains that the intake procedures violate the Fourth Amendment of the United States Constitution, (*id.*, ¶ 57,) which is made applicable to the States through the Fourteenth Amendment.

Florence now moves to certify his class action claim. He defines his proposed class as follows:

> [A]ll arrestees charged with non-indictable offenses processed at Defendant Burlington County Jail and Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officer's [sic] term that procedure a "visual observation" or otherwise, without first articulating a reasonable basis that those arrestees were concealing contraband, drugs or weapons.

(Pl. Proposed Order.)

II. DISCUSSION

"To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met." *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). In considering whether certification is proper, courts refrain from inquiring into the merits of the action and accept the substantive allegations in the complaint as true. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1973). Nonetheless, courts will sometimes examine the allegations, *see Barnes v. Amer. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998), because "the class determination generally [13] involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1977) (citation omitted). Finally, "[t]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should

be committed in favor of allowing class certification." *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985).

With these general principles in mind, the Court will first consider whether Rule 23(a)'s prerequisites are satisfied in this case. It will then analyze whether this action is maintainable under any of the three provisions in Rule 23(b).

A. Rule 23(a) Prerequisites

Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements of numerosity, commonality, typicality, and adequacy of representation "'are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances.'" *Barnes*, 161 F.3d at 140 (quoting *Baby Neal*, 43 F.3d at 55). The Court will consider each of these elements in turn. [14]

Appendix B

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable[.]" "'No single magic number exists satisfying the numerosity requirement.'" *Banda v. Corzine*, Civil Action No. 07-4508 (WJM), 2007 U.S. Dist. LEXIS 80932, at *53 (D.N.J. Nov. 1, 2007) (*quoting Moskowitz v. Lopp*, 128 F.R.D. 624, 628 (E.D. Pa. 1989)). However, the Third Circuit has previously held that the numerosity requirement will generally be satisfied "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

Although the Burlington County Defendants do not to contest numerosity, (*see* Burlington County Def. Br., p. 6,) the Essex County Defendants argue that the requirement is not satisfied in this case. In particular, they claim that "Plaintiff has not supplied one person besides Mr. Florence who was allegedly strip searched." (Essex County Def. Br., p. 20.) This assertion is simply incorrect.

Plaintiff attached to his moving papers records from both the Burlington and Essex Jails. (*See* Pl. Exh. T.) These records contain detailed information for arrestees admitted to each facility on non-indictable offenses between March 3, 2003 and mid-March 2007. In total, there are 1,304 pages of records for the Burlington Jail and 1,134 pages for the Essex Jail, with an average of three arrestee entries per page. By multiplying the average number of arrestees per page by the number of pages, it appears that there are [15] approximately 3,900 non-

indictable arrestees who were admitted to the Burlington Jail and about 3,400 who were admitted to the Essex Jail during the period in question. Since all non-indictable arrestees are subjected to the same intake processes at each facility – processes which Plaintiff claims amount to suspicionless strip searches – the proposed class likely includes several thousand individuals. Joinder of such a large number of plaintiffs would surely be impracticable. Numerosity is therefore satisfied.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class[.]" To satisfy this requirement, the named plaintiff need only show that he "share[s] at least one question of fact or law with the grievances of the prospective class." *Stewart*, 275 F.3d at 227 (citation omitted); *see also Baby Neal*, 43 F.3d at 56 (citation omitted) ("Because the requirement may be satisfied by a single common issue, it is easily met . . .") Moreover, commonality does not require that members of the class share identical claims, but that the plaintiff's interests are representative of the absent class members. *In re Community Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005). Finally, an allegation that the defendants' overall policy injured the plaintiffs satisfies the commonality requirement. *See Danvers Motor Co. v. Ford Motor Co.*, Civil Action No. 02-2197 (DMC), 2007 U.S. Dist. LEXIS 7262, at *23-24 (D.N.J. Jan. 31, 2007).

Here, Florence and the unnamed proposed class members' claims involve the same factual and legal

theories. They allege that they were all subjected to the same intake [16] procedures, which they claim involve suspicionless strip searching. Moreover, all the putative class members challenge the constitutionality of these procedures under the Fourth Amendment. Thus, all plaintiffs claim that they were injured in substantially the same way by the execution of Defendants' allegedly unconstitutional policies or practices under similar factual circumstances. For this reason, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" "The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal*, 43 F.3d at 57 (citations omitted). The inquiry asks whether the named plaintiff's individual circumstances or legal theories significantly differ from those of the unnamed putative class members. *See id.* However, the typicality requirement does not mandate that all putative class members share identical claims. *Barnes*, 161 F.3d at 141; *Baby Neal*, 43 F.3d at 56. Moreover, "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Barnes*, 161 F.3d at 141 (citation omitted); *see also Baby Neal*, 43 F.3d at 58 ("Even relatively pronounced

factual differences will generally not preclude a finding of typicality where there is a strong [17] similarity of legal theories.").

In this case, Plaintiff alleges that the intake procedures he underwent while being admitted into the Burlington and Essex Jails amounted to an unconstitutional suspicionless strip search. This claim is precisely the same as those of the absent putative class members because all non-indictable arrestees admitted to either facility are subjected to the same intake procedures, which require arrestees to remove their clothing while Defendants' officers view their nude bodies. Florence's incentives in relation to this claim therefore seem to align perfectly with those of the rest of the putative class. Accordingly, the Court concludes that he has satisfied the typicality requirement.

Nonetheless, both sets of Defendants argue typicality is not satisfied in this case. The Essex County Defendants contend that Florence cannot satisfy typicality because he alleges that he suffered a body cavity search and not a strip search. (*See* Essex County Def. Br., p. 16.) However, this assertion is contradicted by the allegations in the Amended Complaint wherein Florence specifically claims that he was unconstitutionally strip searched.[5] (*See,*

5. It is true that Plaintiff also alleges he was subjected to the functional equivalent of a body cavity search at each jail. (*See, e.g.*, Am. Compl., ¶¶ 17, 26.) However, Plaintiff confirms in his reply brief that he does not seek class certification on any claim relating to these allegations. (*See* Pl. Reply Br., p. 3.) Instead, he seeks certification only in relation to his strip search claim. (*See id.*)

e.g., Am. Compl., ¶ 64.) The Essex County Defendants also argue that Florence's claim is atypical because he raises several civil rights claims solely on his own behalf in addition to his strip search class claim. (*See* Essex County Def. Br., p. 20; [18] *see also* Am. Compl., Counts 1-2, 4-7.) "This Court, however, has previously rejected the notion that class certification under Rule 23 is 'an all-or-nothing proposition' requiring class certification of all causes of action asserted in a single pleading." *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D.N.J. 1999) (citation omitted) (finding the typicality requirement satisfied, despite the fact that the named plaintiff brought an individual claim in addition to the claims for which she sought class certification, because there was no indication that her interests failed to align with those of the absent class members). Thus, the mere fact that Plaintiff brings additional claims on his own behalf does not render his unlawful strip search claim atypical of the unnamed putative class members' claims.

Additionally, the Burlington County Defendants argue that Florence does not meet the typicality requirement because he was housed in the Burlington Jail as a holdover awaiting transportation to Essex County, rather than being formally processed and admitted into the Burlington Jail for a non-indictable offense. (Burlington County Def. Br., p. 7.) It is worth repeating, however, that "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Barnes*, 161 F.3d at 141 (citation omitted). Here, Florence's claim arises out

of the same practice as the other putative class members' claims, *i.e.*, Defendants' procedures that require non-indictable arrestees to remove their clothing while officers watch. Likewise, [19] the same legal theory – unreasonable search under the Fourth Amendment – animates the representative and the absent plaintiffs' claims. For these reasons, the distinction raised by the Burlington County Defendants does not render Florence's claim atypical.[6]

Both Defendants also raise a point that is more problematic for, but ultimately not fatal to, certification. They claim Florence was actually arrested for the indictable offense of hindering prosecution in the third degree. In other words, they argue that Plaintiff was not a non-indictable arrestee and is therefore precluded from membership in the class he seeks to represent. Notwithstanding these representations, however, the Court concludes that Florence was most likely arrested on March 3, 2005 for a non-indictable offense.

Plaintiff's April 2003 warrant relates, indirectly, to certain offenses with which he was charged in 1998.

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6. The Court notes that, to the extent Florence was not formally processed into the Burlington Jail, he is technically excluded from his proposed class because his class definition is limited to non-indictable arrestees who were processed at Defendants' jails. (*See, supra*, p. 12 of this Opinion & Order.) To rectify this problem, the Court will simply modify the class definition so that it will extend to arrestees who were processed, housed, or held over at Defendants' jails. *See Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 138 (D.N.J. 2002) (quoting *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993)) ("'A court is not bound by the class definition proposed in the complaint . . . .'").

Some, if not all, of these 1998 offenses appear to have been crimes, which require indictment under the New Jersey Constitution. However, most of these charges were dropped in exchange for Plaintiff's guilty plea to hindering prosecution (in violation of N.J. Stat. Ann. § 2C:29-3) and obstructing the administration of law (in violation of N.J. Stat. Ann. § 2C:29-1). (*See* Burlington County Def. Br., pp. 4-5 & Exh. B.) Both of these offenses can either be indictable crimes or non-indictable [20] disorderly persons offenses, depending on the nature of the unlawful conduct at issue. *See* N.J. Stat. Ann. § 2C:29-1(b); § 2C:29-3(b). In Florence's case, they appear to have been indictable. (*See* Burlington County Def. Br. Exh. B.)

At sentencing for these offenses, Plaintiff apparently received a probationary term and a fine. Over the course of time, Florence paid his fine in full. Nonetheless, the Essex County court's probation office believed that the fine was still outstanding. The court therefore set a date on which Plaintiff was [to] appear so that the fine could be enforced. Ultimately, Florence failed to appear for that enforcement hearing and the court therefore issued a bench warrant for his arrest. (*See* Pl. Exh. A.) This warrant was a pre-printed form and included spaces in which an indictment number and a charge were both handwritten. However, the indictment number written on the warrant was the same as the number associated with the 1998 charges. Likewise, the charge listed on the warrant was third degree hindering prosecution, one of the two 1998 crimes to which Plaintiff had previously pled guilty. In other words, it appears that indictment and charge spaces on the warrant were filled in to reference the old charges, rather than the new offense of failing to appear for the

enforcement hearing. For the purpose of determining whether Plaintiff was an indictable or non-indictable arrestee in March 2005, however, the critical inquiry is really the classification of the offense an individual commits when he fails to appear before a court.

According to New Jersey's Criminal Justice Information Systems ("CJIS") [21] program,[7] the April 2003 warrant was issued pursuant to N.J. Stat. Ann. § 2A:10-11[8] and sought Plaintiff's arrest for civil contempt. (*See* Burlington County Def. Exh. D.) Although Plaintiff seems to suggest in his papers and at oral argument that civil contempt is always a non-indictable offense, this appears not to be the case under New Jersey law; instead, contempt may, in the court's discretion, be prosecuted summarily, *i.e.*, without indictment, or as a crime. *In re Buehrer*, 236 A.2d 592, 603-04 (N.J. 1967). However, in a summary prosecution for contempt, the court may not impose a punishment in excess of six months imprisonment, a fine of $1,000, or both. *Id.*; *see In re Yengo*, 417 A.2d 533, 539 (N.J. 1980) (holding that there was no right to indictment for a lawyer who was charged with civil

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7. The CJIS program is a statewide computerized information system that permits authorized users to access various criminal history files for arrest, prosecutorial, and custody information. *See* website of the New Jersey State Police, Identification & Information Technology Section, http://www.state.nj.us/njsp/divorg/admin/iits.html (last visited March 14, 2008).

8. Under N.J. Stat. Ann. § 2A:10-1(c), New Jersey courts are empowered to punish "[d]isobedience or resistance by any . . . any person whatsoever to any lawful writ, process, judgment, order, or command of the court."

contempt for failing to appear at a court hearing where the lawyer was fined only $500 and sentenced to no jail term).

In this case, there is no evidence in the record suggesting that Florence was charged with the variety of civil contempt that requires indictment. For example, there is no indication of any attempt to actually indict him for the alleged contempt. Likewise, there is nothing to suggest he would have been subjected to a sentence in excess of six [22] months imprisonment or a $1,000 fine had he been found guilty of contempt. Finally, there is testimony in the record suggesting that at least some of Defendants' officers believed Florence to be non-indictable and treated him accordingly.[9]

Ultimately, the record is not absolutely clear regarding whether Plaintiff was indictable or non-indictable. On balance, however, it suggests the latter. Given the Third Circuit's command that "[t]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing class certification," *Eisenberg*, 766 F.2d at 785, the Court concludes that Florence was most likely arrested for the non-indictable variety of civil contempt. Thus, the factual circumstances surrounding his commitment into Defendants' jails are typical of those of the class.

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9. For example, according to one Burlington Jail officer, Florence was not strip searched, but instead was "visually observed," because he was arrested for a non-indictable offense. (*See* Pl. Exh. J, 24:15-25:2).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy requirement "encompasses two distinct inquiries designed to protect the interests of the absentee class members." *Barnes*, 161 F.3d at 141. First, it tests class counsel's qualifications to represent the class. *Id.*; *see Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975) ("[T]he plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation[.]"). Second, it serves to uncover any conflicts of interest that exist between the [23] named parties and the class as a whole. *Barnes*, 161 F.3d at 141. In other words, the named plaintiff's interests must not be antagonistic to the unnamed class members. *See Wetzel*, 508 F.2d at 247.

In this case, Defendants do not challenge the adequacy of class counsel. This fact, combined with counsels' extensive qualifications, (*see* Pl. Br., pp. 32-35,) convince the Court that counsel is "qualified, experienced, and generally able to conduct the proposed litigation," *Wetzel*, 508 F.2d at 247.

Defendants do take issue with Florence's ability to adequately represent the putative class as the named plaintiff. However, their arguments are merely recapitulations of those they previously offered in the context of typicality. For example, the Burlington County Defendants argue that Florence cannot adequately represent the interests of the absent putative class members who were processed and admitted into the

Burlington Jail for non-indictable offenses because he was housed there as a holdover. (*See* Burlington County Def. Br., p. 7.) Likewise, the Essex County Defendants contend that Plaintiff has a conflict of interest with the absent putative class members because he additionally suffered alleged civil rights violations that are beyond the scope of the class claims. (*See* Essex County Def. Br., pp. 20-21.)

As noted above, however, the Court finds that Florence's interests are perfectly aligned with those of the absent class members on the claim for which he seeks certification. There is no indication that Florence will be subjected to a unique defense at [24] trial that could cause his interests to diverge from those of the putative class members. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006) ("To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial."). Simply put, Defendants have failed to identify any compelling reason why Plaintiff's interests are antagonistic to the putative class.

Therefore, the Court concludes that Plaintiff will adequately represent the class.

B. Maintainability of this Action Under Rule 23(b)

To be certified, a class must not only satisfy the requirements of Rule 23(a), but must also demonstrate that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997). Rule 23(b)(3) provides in relevant part

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(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and [25]
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Class certification under this provision must satisfy the twin requirements of

predominance and superiority. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, LLC*, 259 F.3d 154, 186 (3d Cir. 2001). Each will be discussed in turn.

1. **Predominance**

Rule 23(b)(3)'s predominance element incorporates, and is more demanding than, the commonality requirement of Rule 23(a). *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004). Predominance requires that common issues predominate over issues affecting only individual class members. *Id.* The inquiry therefore "focuses on whether the efficiencies gained in resolving these common issues together are outweighed by the individual issues presented for adjudication." *Cannon*, 184 F.R.D. at 545 (citation omitted). "That common issues must be shown to 'predominate' does not mean that individual issue[s] need be non-existent. All class members need not be identically situated upon all issues, so long as their claims are not in conflict with each other." *Id.* (citation omitted).

In this case, the Essex County Defendants contend that predominance has not been established because there will likely be individual issues concerning each arrestee's background and record. (*See* Essex County Def. Br., p. 21.) Presumably, they are arguing that liability will turn on whether particular searches of particular arrestees were constitutionally justified. This argument is unpersuasive. [26]

As an initial matter, it is worth noting generally that courts have previously rejected arguments similar to the

one offered by the Essex County Defendants. For example, in *Johnson v. District of Columbia*, a class action strip search defendant claimed that common issues failed to predominate because the case would focus on whether each individual arrestee was searched without a sufficient constitutional basis, which would in turn require a detailed inquiry into all the facts and circumstances known about each arrestee. Civil Action No. 02-2364 (RMC), 2008 U.S. Dist. LEXIS 9069, at *26-27 (D.D.C. Feb. 8, 2008). The court disagreed and explained that the plaintiffs challenged whether the defendant had a policy or practice of subjecting proposed class members, regardless of charge, to a particular strip search procedure and whether this procedure violated the Fourth Amendment. *Id.* at *27. This, the court found, could be resolved by reference to generalized proof. *Id.*

This case is similar to *Johnson* insomuch as Plaintiff challenges whether Defendants' have a policy or practice of using intake procedures for non-indictable arrestees that are tantamount to suspicionless strip searches. This issue is at the heart of each putative class members' claim and turns on generalized, not individualized, proof.

This point is made especially clear in light of the District of New Jersey's strip search jurisprudence, under which the constitutionality of a strip search turns on the existence of reasonable suspicion that an arrestee is concealing weapons or contraband. *See, e.g., Davis v. City of Camden*, 657 F. Supp. 396, 399 (D.N.J. 1987). This requisite [27] suspicion can be supplied in either of two ways: (1) "the specific circumstances relating to the

arrestee or the arrest," or (2) "the nature of the charged offense." *Id.* at 400. Thus, *Davis* did not prohibit blanket strip search policies; it simply requires them to be predicated on some application of the reasonable suspicion standard. *See id.* (stating that a blanket strip search policy would likely be constitutionally acceptable if it applied only to individuals who were charged with felonies or with misdemeanors involving weapons or contraband).

In this case, Plaintiff defines the proposed class to include *only* those non-indictable arrestees for whom there was *no* predicate articulation of reasonable suspicion. (*See, supra*, p. 12 of this Opinion & Order.) Additionally, the record indicates that all arrestees at the Essex Jail are subjected to the same intake procedures without regard to the nature of their charged offense.[10] (*See* Pl. Exh. O, 13:23-14:11, 34:6-16; Pl. Exh. P, 9:21-10:1; Pl. Exh. Q, 22:11-20, 32:13-19.) The Court therefore disagrees with the notion that liability will turn on individual questions relating to the justification for strip searches of particular arrestees. Rather, liability will seemingly boil down to whether the intake procedures, which require Defendants' officers to view the nude bodies of non-indictable arrestees, are tantamount to strip searches. This is a common question and, as previously stated, is subject to generalized proof. [28]

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10. Although the Burlington County Defendants do not contest predominance, the Court notes that there is similarly testimony in the record indicating that all arrestees at the Burlington Jail –whether indictable or non-indictable – are subjected to the so-called "visual observation." (*See* Pl. Exh. F, 17:14-19, 27:1-7; Pl. Exh. H, 54:4-12.)

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The Essex County Defendants also argue that individual issues will predominate over common issues because each putative class member will have to present his own proof of damages depending on the scope of the illegal search he allegedly suffered. (*Id.*, pp. 19, 21.) The Court certainly accepts that some members of the putative class may have suffered more invasive searches, and would therefore be entitled to greater damages, than others. However, the Third Circuit has previously held that "the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977). Indeed, courts routinely find predominance satisfied in class action strip search cases notwithstanding the possibility that an individualized calculation of damages may be necessary. *See, e.g.*, *Johnson*, 2008 U.S. Dist. LEXIS 9069, at *28; *Marriott v. County of Montgomery*, 227 F.R.D. 159, 173 (N.D.N.Y. 2005). In fact, the *Johnson* court even highlighted several ways of dealing with possible individualized damages issues, such as:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Johnson, 2008 U.S. Dist. Lexis 9069, at *29. For these reasons, the Court finds that predominance is satisfied notwithstanding the possibility that there will be issues of [29] individualized damages.

2. **Superiority**

The superiority analysis focuses on whether a class action is the best method for achieving a fair and efficient adjudication. *Newton*, 259 F.3d at 186. To this end, Rule 23(b)(3) provides a non-exhaustive list of several factors to help determine whether a class action is the superior method of adjudication:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

In this case, each factor favors class certification. First, it appears that putative class members would have little interest in pursuing individual claims against Defendants. "It is generally recognized that class certification is preferred where 'the recovery being sought by each of the plaintiffs is not sufficiently large to render individualized litigation a realistic possibility.'" *Cannon*, 184 F.R.D. at 546 (quoting *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 351 (D.N.J. 1997) (in turn citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985))). Plaintiff contends, and neither set of Defendants dispute, that strip search class actions nationwide average [30] settlements of only $1,500 per person. (Pl. Br., p. 23.) Given the relatively small economic stake that any one clas member has in this case, the Court concludes that the first factor favors class treatment.

The second factor also favors class certification. The Court is unaware of any other strip search litigation pending against the Essex County Defendants by potential class members. And while another class action has recently been filed in this Court arising out of the intake procedures at the Burlington Jail, *see Haas v. Burlington County*, Civil No. 08-1102 (JHR), this parallel case is in its infancy and therefore does not militate against certification here.

The third factor favors certification because it is generally "desirable to litigate similar, related claims in one forum." *Cannon*, 184 F.R.D. at 546 (citation omitted). Lastly, the Court has no reason to believe there will be any difficulty in managing this case. Therefore, the fourth

factor also points to the superiority of class treatment in this case and the Court accordingly finds that superiority is met.

C. The Essex County Defendants' Remaining Arguments

The Essex County Defendants raise several additional arguments, both in their opposition papers and at oral argument, to which the Court will now respond. However, none of these arguments is particularly persuasive.

The Essex County Defendants argue at length that Plaintiff has not proven a constitutional violation of the variety contemplated by *Monell v. Department of Social* [31] *Services*, 436 U.S. 658 (1978).[11] To this end, they cite cases that stand for the proposition that a government entity will be held liable for unlawful strip searching only if the plaintiff presents sufficient evidence that the search was conducted pursuant to the government's policy or practice. *See Turner v. Knight*, 121 Fed. Appx. 9, 15-16 (4th Cir. 2005); *Loeber v. Count of Albany*, 216 F. Supp. 2d 20, 23 (N.D.N.Y. 2002). Relatedly, they cite to cases suggesting that an officer's incidental or accidental viewing of an arrestee's nude body does not amount to an unconstitutional strip search. *See, e.g., Wood v. Hancock*, 354 F.3d 57, 65 (1st Cir. 2003).

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11. In *Monell*, the Supreme Court held that a municipality may be held liable under 42 U.S.C. § 1983 only when the plaintiff proves that he was injured as a result of the execution of the municipality's policy or custom. *Monell*, 436 U.S. at 694.

Relying on these principles, the Essex County Defendants argue that the evidence in the record reveals no policy or practice of conducting illegal strip searches at their jail. At most, they claim, any viewing of arrestees' nude bodies by their officers was inadvertent and therefore not a constitutional violation. They attempt to lend some inferential support to their argument by noting that, since 2005, their intake procedures included the use of a device which scans fully-clothed arrestees for contraband, which ostensibly suggests that there would be no need to conduct widespread strip searches. Moreover, they point to the fact that a state ombudsman charged with overseeing the county jails in New Jersey has never received a complaint about illegal strip searching in Essex County. [32]

The Court rejects these arguments as irrelevant, at least in the present context. In essence, the Essex County Defendants are attempting to contest the merits of Florence's case. A motion for class certification is hardly the appropriate occasion for such a challenge because, in considering whether certification is proper, courts refrain from inquiring into the merits of the action and accept the substantive allegations in the complaint as true.[12] *See*

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12. The Court notes that the Essex County Defendants cite to a case called *Gustafson v. Polk County*, 226 F.R.D. 601, 606 (W.D. Wis. 2005), in which a court seemed to analyze the merits of a plaintiff's unlawful strip search case in the course of ruling on her motion for class certification. However, the court did this only because the proposed class definition included individuals who, under the law in that jurisdiction, could constitutionally be strip searched. *See id.* As such, the court found that the plaintiff's challenge did not pose a question that was common or typical to

Eisen, 417 U.S. at 177-78. If the Essex County Defendants wished to challenge Plaintiff's proofs at this juncture, they should have filed a motion for summary judgment along with their opposition to the motion for certification. They did not do this and the Court will therefore save an analysis of the merits for some other day.

The Essex County Defendants next argue that, if the Court certifies the class, it should bifurcate the eventual trial to determine separately liability and damages. The Court agrees that bifurcation may be a suitable way with which to deal with individualized damages issues should they arise. (*See, supra*, p. 28 of this Opinion & Order.) However, the Court is not yet persuaded that these issues will necessarily arise. For this reason, the Court will not order bifurcation at this time, but will revisit the issue [33] at any party's request as this case nears trial.

Third, the Essex County Defendants note that under *Davis*, 657 F. Supp. 396, a strip search is not necessarily unconstitutional. They therefore request that the Court redefine the proposed class to exclude "those persons who were lawfully searched . . . ." (Essex County Def. Br., p. 25.) As an initial matter, this proposal is fatally flawed because of its highly circular in nature. It would require an individual to prove he was unlawfully strip searched as

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the proposed class. *See id.* In this case, by contrast, Florence's proposed class includes only individuals against whom a strip search would be unlawful under District of New Jersey case law. Moreover, as previously discussed, Plaintiff has satisfied commonality and typicality, as well as the other requirements of Rule 23.

a precursor to class membership. However, no one could prove this until, after having already been admitted to the class, the action is resolved favorably to the plaintiffs. For this reason alone, the Court could not redefine the class as requested. *See, e.g., Vinson v. Seven Seventeen HB Phila. Corp No. 2*, Civil Action No. 00-6334, 2001 U.S. Dist. LEXIS 25295, at *52 (E.D. Pa. Oct. 31, 2001) (citation omitted) ("Where a proposed class requires the court to address 'the central issue of liability' in the case, the class definition may be untenable.").

More importantly, the modification requested by the Essex County Defendants is unnecessary; Plaintiff's proposed class definition already takes into account the fact that strip searches are not necessarily unconstitutional under *Davis*. Again, *Davis* requires strip searches to be based on reasonable suspicion, see 657 F. Supp. at 399, which can be supplied either by specific facts known about the arrestee or the arrest, or by the nature of the charged offense, *id.* at 400. Here, the record indicates that all arrestees at the Essex Jail are subjected to the same intake procedures without regard to the nature of their [34] charged offense. (*See* Pl. Exh. O, 13:23-14:11, 34:6-16; Pl. Exh. P, 9:21-10:1; Pl. Exh. Q, 22:11-20, 32:13-19.) Moreover, Plaintiff's proposed class definition includes only those non-indictable arrestees whose alleged strip searches were not predicated on an articulation of reasonable suspicion. Therefore, the only arrestees included in Plaintiff's proposed class definition are those against whom a strip search would be unlawful.

Finally, the Essex County Defendants observed at oral argument that the Essex Jail houses an unusually large

number of violent offenders. They further observed that the Third Circuit has never addressed the constitutionality of blanket strip search policies. Instead, there are only opinions from the District of New Jersey, such as in Davis. Frankly, the Court is uncertain of the point the Essex County Defendants are trying to make. If they are suggesting that the large number of violent offenders in their facility somehow obviates their need to comply with the law, they are mistaken. They are similarly mistaken if they believe that the absence of an opinion from the Court of Appeals casts doubt on the underlying legal principle that suspicionless strip searching is unlawful; *Davis* is an opinion of this Court and is therefore the law within this District. The Court finds that Plaintiff has carried his burden under Rule 23 notwithstanding Defendants' arguments to the contrary. Accordingly, certification will be granted.

D. Notice to Potential Class Members

Federal Rule of Civil Procedure 23I(2)(B) provides that, in any class action maintained under Rule 23(b)(3), notice shall be given to the class in the best practicable [35] manner. Although the Court is in receipt of Plaintiff's proposal regarding notice, (*see* Pl. Br., pp. 35-36,) it will refrain from authorizing this plan until it has heard from both Defendants on this issue. Defendants are hereby instructed to submit their positions in writing within 15 days of the date of this Opinion & Order. To the extent that Plaintiff then feels it necessary to do so, he may respond to Defendants' positions within 7 days thereafter.

E. Appointment of Class Counsel

Rule 23(g)(1) requires the Court to appoint class counsel. As previously discussed, the Court finds that Plaintiff's counsel is "qualified, experienced, and generally able to conduct the proposed litigation," *Wetzel*, 508 F.2d at 247. The Court will therefore appoint them as class counsel.

III. CONCLUSION

For the foregoing reasons, as well as those placed on the record during oral argument on February 27, 2008,

IT IS THIS 20th day of March, 2008 hereby

ORDERED that Plaintiff's motion for class certification [73] is **GRANTED**; and

IT IS FURTHER ORDERED that the class hereby certified is defined as:

All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" [36] or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons;

IT IS FURTHER ORDERED that Defendants submit in writing within 15 days of the date of this Opinion & Order their positions regarding Plaintiff's proposal for handling notice to potential class members; and Plaintiff, to the extent he feels it necessary, may respond to Defendants' submissions within 7 days thereafter; and

IT IS FURTHER ORDERED that Plaintiff's attorneys are appointed as counsel for the class.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED MAY 5, 2008

[1] NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT OCURT
FOR THE DISTRICT OF NEW JERSEY

Hon. Joseph H. Rodriguez

Civil Action No. 05-3619

ORDER

ALBERT W. FLORENCE,

Plaintiff,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

Presently before the Court is a motion for reconsideration [96] filed by the following Defendants (hereinafter collectively referred to as "the Essex County Defendants"): 1) the Essex County Correctional Facility ("Essex Jail"); 2) several John Doe Essex Jail officers; 3) and the Essex County Sheriff's Department. Plaintiff Albert Florence ("Florence") was a non-

indictable arrestee who was processed into the Essex Jail in March 2005. While there, he was allegedly strip searched without any individualized suspicion that he was concealing contraband, weapons, or drugs. He therefore filed a Complaint against, *inter alia*, the Essex County Defendants, alleging a Fourth Amendment violation. He later amended his Complaint to add a class action claim relating to the alleged illegal strip searching. On March 20, 2008, the Court granted Florence's motion for certification of his class claim, defining the class as:

> All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from [2] March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.

(Opinion & Order, 3/20/08, Docket Item No. 94, pp. 35-36.)

The Essex County Defendants now move for reconsideration of the Court's March 20 Order granting class certification. Specifically, they request an amendment to the class definition such that an individual would be a class member only if the officers who inspected his or her nude body "visually search[ed] for weapons and

contraband . . . ." (Essex County Def. Proposed Order.) For the following reasons, however, the Court will deny their motion.[1]

Local Civil Rule 7.1(i), which governs motions for reconsideration in this District,[2] [3] provides in relevant part:

> A motion for reconsideration shall be served and filed within 10 business days after the entry of the order . . . on the original motion by the Judge . . . . A brief setting forth concisely the

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1. Florence claims this motion should be dismissed as untimely. He notes the original Order was entered on March 20, 2008 and the instant motion was filed on April 1, 2008, a difference of 12 calendar days. His contention is erroneous, however, because the appropriate count is of business, not calendar, days. *See* L. Civ. R. 7.1(i) (indicating that a motion for reconsideration must be filed within "10 business days" of the order for which reconsideration is sought); *see also* Fed. R. Civ. P. 59(e) (stating that a motion to alter judgment must be filed within "10 days" of the entry of judgment); Fed. R. Civ. P. 6(a)(2) (providing that Saturdays, Sundays, and legal holidays are excluded from computation of time periods under the Federal Rules when the period is less than 11 days). By the Court's count, the instant motion was filed 8 business days after the original Order's entry. The motion is therefore timely.

2. The Essex County Defendants actually filed this motion pursuant to Federal Rule 59(e). However, in the District of New Jersey, motions for reconsideration are governed by Local Civil Rule 7.1(i), not Federal Rule 59(e). *See United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999). The Court will therefore treat this motion as though it was appropriately filed under Local Rule 7.1(i).

> matter or controlling decisions which the party believes the Judge . . . has overlooked shall be filed with the Notice of Motion.

L. Civ. R. 7.1(i). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). It must be stressed, however, that reconsideration is "an extraordinary remedy" and is granted "sparingly." *NL Indus., Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996).

To succeed on a motion for reconsideration, the moving party must show "more than a disagreement" with the decision he would like reconsidered. *Anders v. FPA Corp.*, 164 F.R.D. 383, 387 (D.N.J. 1995). Instead, there must be some "dispositive factual matters or controlling decisions of law" that were presented to the court, but not considered. *Compaction Sys. Corp.*, 88 F. Supp. 2d at 345. "A mere recapitulation of the cases and arguments considered by the court before rendering the original decision" does not warrant a grant of reconsideration. *S.C. v. Deptford Twp. Bd. of Educ.*, 248 F. Supp. 2d 368, 381 (D.N.J. 2003).

A motion for reconsideration will likewise fail if the moving party merely raises arguments or presents evidence that could have been raised or presented before the original decision was reached. *NL Indus. Inc.*, 935 F. Supp. at 516. Thus, the moving [4] party must actually present "something new or something overlooked by the court in rendering the earlier decision." *Khair v. Campbell*

Soup Co., 893 F. Supp. 316, 337 (D.N.J. 1995) (citing *Harsco Corp.*, 779 F.2d at 909). The word "overlooked" is the operative term and has been consistently interpreted as referring only to facts and legal arguments that might reasonably have resulted in a different conclusion had they been considered. *United States v. DeLaurentis*, 83 F. Supp. 2d 455, 474 n.2. (D.N.J. 2000).

In this case, reconsideration is inappropriate. The Essex County Defendants do not point to any dispositive factual matters or controlling legal decisions that the Court overlooked in rendering its original decision. Nor do they identify any manifest legal or factual errors, or present newly discovered evidence. Instead, they simply disagree with the original decision because the class definition it approved does not explicitly exclude arrestees whose nude bodies were viewed only inadvertently.[3] In essence, they are attempting to reargue their view of the record, *i.e.*, that there is no evidence of deliberate strip searching by their officers. The Court considered and rejected this argument in rendering its original decision

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3. In the course of making this argument, the Essex County Defendants write in their moving brief, "It appears from the class certification order, [sic] that the mere fact of an arrestee taking off their [sic] clothes in public is considered a strip search." (Essex County Def. Br., p. 3.) This characterization of the original decision is erroneous; the Court never suggested that directing arrestees to disrobe *necessarily* amounted to strip searching. The original decision dealt only with class certification and not liability. In fact, the March 20 Opinion & Order repeatedly indicated that liability was an open question to be resolved at some later date. (*See* Opinion & Order, 3/20/08, Docket Item No. 94, pp. 27, 32.)

because it spoke to the case's merits rather than whether certification was appropriate. Presenting this argument again amounts to an unacceptable [5] recapitulation of what was previously considered and therefore does not warrant a grant of reconsideration.

The Essex County Defendants also seek reconsideration because, they claim, the Court erred by indicating "that they [sic] it was impermissible to consider the specific security situation of the Essex County Jail, [sic] in ruling on class certification . . . ." (Essex County Def. Br., p. 5.) This argument is wholly unpersuasive. The Court never suggested the need for institutional security was unimportant in determining the scope of arrestee rights. Instead, it merely stated, in response to a misplaced argument against certification, the seemingly obvious point that the Essex Jail must comply with federal constitutional law notwithstanding the number of violent offenders it houses. (*See* Opinion & Order, 3/20/08, Docket Item No. 94, p. 34.) The Essex County Defendants cite no authority, let alone controlling authority, suggesting this statement represents a manifest legal error. Moreover, their argument has no bearing whatsoever on whether certification was erroneously granted.

The Essex County Defendants have failed to show that the "extraordinary remedy" of reconsideration is warranted in this case. Accordingly,

Appendix C

IT IS THIS 5th day of May, 2008 hereby

ORDERED that their motion for reconsideration [96] is and be DENIED.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

APPENDIX D — INMATE INTAKE RECORD

INMATE INTAKE RECORD

INMATE NUMBER: H/O 5050

DOCUMENT NUMBER: _____	DETAINER NUMBER: 01
( ) Initial ( ) Additional ( ) Temporary Commit ( ) County BW ( ) GJ Commit ( ) Sentence ( ) Municipal	FROM: Essex Co. Sheriff
HEARING PLACE: _____	CITY: _____ STATE: NJ
DATE: _____ TIME:_____ BAIL $ _____	TELEPHONE NUMBER: _____
SENTENCE LENGTH: _____	DATE RECEIVED: 3-3-05
CHARGES:	REMARKS/CHARGES:
01 _____ DESC: _____	2A: 10-1C
02 _____ DESC: _____	Civil Contempt
03 _____ DESC: _____	_____
04 _____ DESC: _____	_____
05 _____ DESC: _____	_____
COMMITTED BY: _____	BAIL AMOUNT: $ _____

DOCUMENT NUMBER: _____

( ) Initial ( ) Additional ( ) Temporary Commit ( ) County BW ( ) GJ Commit ( ) Sentence ( ) Municipal

HEARING PLACE: _____

DATE: _____ TIME: _____

BAIL $ _____

SENTENCE LENGTH: _____

CHARGES:

01 _____ DESC: _____

02 _____ DESC: _____

03 _____ DESC: _____

04 _____ DESC: _____

05 _____ DESC: _____

COMMITTED BY: _____

DETAINER NUMBER: _____

FROM: _____

CITY: _____ STATE: _____

TELEPHONE NUMBER: _____

DATE RECEIVED: _____

REMARKS/CHARGES:

_____

_____

_____

_____

BAIL AMOUNT: $ _____

DOCUMENT NUMBER: _____	DETAINER NUMBER: ____
( ) Initial ( ) Additional ( ) Temporary Commit ( ) County BW ( ) GJ Commit ( ) Sentence ( ) Municipal	FROM: _____
HEARING PLACE: _____	CITY: _____ STATE: _____
DATE: _____ TIME:_____ BAIL $ _____	TELEPHONE NUMBER: _____
SENTENCE LENGTH: _____	DATE RECEIVED: _____
CHARGES:	REMARKS/CHARGES:
01 _____ DESC: _____	_____
02 _____ DESC: _____	_____
03 _____ DESC: _____	_____
04 _____ DESC: _____	_____
05 _____ DESC: _____	
COMMITTED BY: _____	BAIL AMOUNT: $ _____

APPENDIX E — PRISONER INTAKE/ DISCHARGE, POLICY 04-06

[SA-37]
DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE DIRECTIVE

Subject: PRISONER INTAKE/ DISCHARGE	Directive Number: 04-06
Distribution: GENERAL	Effective Date: APRIL 21, 2005 REVISED

This Administrative Directive consists of the following numbered sections:

I. AUTHORITY
II. PURPOSE
III. STANDARDS
IV. POLICY
V. APPLICABILITY
VI. DEFINITIONS
VII. PROCEDURES
VIII. RESPNSIBILITY FOR COMPLIANCE
IX. EFFECTS OF THIS DIRECTIVE

I. AUTHORITY

This Directive is issued on the authority of the Department of Corrections Director who delegates to the Warden of the Essex County Correctional Facility the authority to manage and direct all inmates, personnel, programs and activities connected with the facility.

Appendix E

II. PURPOSE

This Administrative Directive establishes procedural guidelines for the management of prisoner admissions to and discharges from the correctional facility.

III. STANDARDS

A.C.A. 3-ALDF-4A-01, 02, 03 and 04

N.J.A.C. 10A:31-21.1, 21.2, 21.3, 21.4, 21.5, 21.7 and 31-8

IV. POLICY

It shall be the policy of the Department of Corrections to accept all persons lawfully committed to the custody of the Department of Corrections; however, persons with evident medical or psychiatric problems, including intoxication, must be accompanied by current documentation, signed by a physician, declaring such persons suitable for admission to the Essex County Correctional Facility.

Further, all persons presented for admission to the Essex County Correctional Facility shall be accompanied by a proper commitment document, signed by a Judge, Magistrate, or a Municipal Court Administrator, which shall include a bail. In addition, the Department of Corrections reserves the right to limit the amount of personal property to be accepted, for safekeeping, with persons presented for admission to the correctional facility. Bulk property shall be

deemed unacceptable and shall remain in the custody of the arresting authority.

Discharges, releases and transfers from Department of Corrections custody will occur only with valid and legal documentation from the Courts or receiving agencies, and upon completion of proper criminal history checks and identification protocols.

V. APPLICABILITY

The Administrative Directive is applicable to all inmates, Department of Corrections employees, civilian and sworn, as well as contract employees and guests.

VI. DEFINITIONS

The following words and terms, when used in this Directive, shall have the following meanings unless the context clearly indicates otherwise:

Body Orifice Scanning System (B.O.S.S. Chair): A non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities.

Commitment: Any person lawfully presented to the Department of Corrections for detention.

Commitment Papers: A warrant or formal authorization to hold an inmate for prosecution or detention by a

Federal, State or local law enforcement agency or the U.S. Department of Homeland Security.

Detainers: Legal and valid law enforcement or Court documents which may hold and detain a defendant and may include but not be limited to:

1. Municipal charges for which there has been no legal action to date.

2. Adjudicated criminal charges for which sentence has been imposed.

3. Criminal charges resulting from indictment for which there is no final disposition (open charges).

4. Warrants for violation of parole or probation.

5. Immigration Detainers.

Discharges: The lawful and legal release of the defendant to the community, municipal police department, Sheriff's Office or other local State or Federal jurisdiction upon presentation of legal and valid transfer documents or receipt of requisite bail or Court Order.

Management Information Systems (MIS) Admission/ Discharge Manual: The document describes the step-by-step process to enter all admissions, movements and discharges into the County Correctional Information System (CCIS) and through the electronic interface into the DSI System.

Appendix E

Victim Notification Form: The document completed by the victim requesting notification of a defendant's release or change-of-status and received from the Municipal Police Department at the time of admission to the Essex County Correctional Facility.

VII. PROCEDURES

These procedures are divided into six (6) broad categories including:

1. Security and Control

2. Intake Reception

   a) Pre-booking

   b) Sheriff's Office Identification Process

   c) Return from Sheriff's Office

3. Admission/Booking Process

4. Records and Classification

5. Center Count Control

6. Discharge Process

Appendix E

1. Security and Control

a) General:

The Intake Control Officer shall monitor and maintain surveillance and security of the Intake Yard and the Intake Reception Area; and, with proper authorization, control access to and egress from the Intake Reception Area.

Upon the arrival of law enforcement officers at Intake Control, the Intake Control Officer shall ascertain the nature of the visit and so advise the appropriate law enforcement agency, i.e., Department of Corrections (DOC), Essex County Sheriff's Department (ECSD), or Newark Police Department (NPD), etc.

Further, the Intake Control Officer shall direct visiting law enforcement officers as to where to park their vehicles, to secure their weapons, and when it is appropriate to remove prisoners from their vehicles.

Meanwhile, the Intake Control Officer will obtain verbal authorization, from the agency to be visited, to permit the visiting law enforcement officers and their prisoners to enter the facility.

With the appropriate authorization, the Intake Control Officer shall then direct the visiting law enforcement officers and their prisoners to enter the facility.

Equally, as law enforcement offers seek to exit the facility, with or without prisoners, the Intake Control Officer will obtain verbal authorization, to include the number of prisoners, where applicable, from the visiting agency, as well as ensuring that the Intake Yard is secure, prior to granting egress.

Where prisoners are being brought out of the facility, the Intake Control Officer shall ensure that all prisoners have been secured in the police vehicle, prior to allowing law enforcement officers to retrieve their weapons.

b) Intake Reception Security Officer:

The Intake Reception Security Officer shall:

1) Maintain communication with the Intake Reception Officer;

2) Preserve the security of the Intake Reception area;

3) Search and secure prisoner holding cells both before and after each usage;

4) Meet arriving law enforcement officers and their prisoners at the Entrance Sallyport and direct them to appropriate staging/holding facilities;

5) Direct the law enforcement officer to uncuff his/her prisoners, one at a time, and to produce that prisoners commitment papers and personal property;

6) Pat-frisk the prisoner and direct the law enforcement officer to present the prisoner, commitment document(s) and the prisoner's personal property to the Intake Reception Officer;

7) Secure and monitor prisoners in holding cells to await the Sheriff's I.D. process and or transfer to Booking; and

8) Transfer prisoners, commitment documents and personal property to the Booking area.

c) Booking Area Security Officer:

The Booking Area Security Officer shall:

Appendix E

1) Maintain communication with the Booking Officer;

2) Preserve the security of the Booking area;

3) Search and secure inmate waiting/ holding areas before and after each usage;

4) Supervise inmate activities;

5) Conduct a thorough search of individual inmates;

6) Ensure that all newly admitted inmates receive an intake shower and use Rid shampoo to prevent the spread of communicable diseases;

7) Observe and document, in writing, any evidence of:

   a) Notable body markings such as "tattoos;"

   b) Body vermin or disease;

   c) Open sores, visible wounds, scars, injuries, casts, braces, prosthesis or other devices; and

d) Advises Classification and or Medical Departments of such observations.

8) Newly admitted inmates may be subjected to a strip search or body cavity search only in accordance with the conditions set forth in N.J.A.C. 10A:31-8.

b) Releases to other custody/jurisdictions (Municipal, State DOC, Federal or out-of-state).

1) Review all Court and legal documents to ensure there are no legal impediments to releases.

2) Complete CCIS, CCH, NCIC, III, ACS and ATS. Verify prisoner background check prior to release.

3) Enter offender on CCIS Transportation and Discharge Count (screen scrape to DSI).

4) Place offender in Intake transportation.

5) Property – turned over to receiving jurisdiction.

6) Generate a check from DSI and give to inmate or receiving jurisdiction at the time of release.

Appendix E

NOTE: A check for the transfer of all State Inmates will be provided to CRAF subsequent to transfer.

7) Release to other receiving jurisdiction.

8) Enter discharge into CCIS (screen scrape to DSI).

9) Balance counts twice per shift.

VIII. RESPONSIBILITY FOR COMPLIANCE

All Department of Corrections personnel are responsible for compliance with this Administrative Directive. Command and Supervisor personnel shall ensure that this Directive is brought to the attention of subordinates and is understood and complied with by all concerned.

IX. EFFECT OF THIS DIRECTIVE

This Administrative Directive is supplemental to any established Orders, Policies or Memoranda. However, any Orders, Policies or Memoranda, which are in conflict with this Administrative Directive are hereby superseded.

BY ORDER OF: /s/ _____
LARRY GLOVER, WARDEN

AUTHORIZED AND APPROVED BY:
/s/ _____
SCOTT A. FAUNCE, SR., DIRECTOR

SCHEDULED REVIEW DATE: ____/____/____

APPENDIX F — REPORT OF ARREST, ESSEX COUNTY SHERIFF'S OFFICE

ESSEX COUNTY SHERIFF'S OFFICE
CRIMINAL COURTS BUILDING,
NEWARK N.J. 07102

3/09/05
23:39:17

* * REPORT OF ARREST * *

ARRESTEE INFORMATION CA#:05 001388

NAME: FLORENCE, ALBERT SBI: 326995C
BLK/MALE/NONHIS FBI: 880053FB8
HAIR: BLK EYES: BRO BCI: A263281
HGT: 603 WGT: 210 PHT: - 00000
DOB: [REDACTED] AGE: 29 SS#: [REDACTED]
POB: [REDACTED] PHN:[REDACTED]
MAR:MAR AKA:
OLN: LIS:
ADD:
[REDACTED]
[REDACTED]
BLD: APT:
EMP:

NEAREST RELATIVE

NAME: HOGANS, CARO[L] RELATION:MOTHER
ADD: [REDACTED]
BLD: [REDACTED] APT: PHN: [REDACTED]

Appendix F

ADDRESS DETAILS

PLACE OF ARREST: DOA: 3/09/05
DOREMUS AVE TIME: 23:36
NEWARK NJ 00000
ELD/LOC: ECCF/BCI FL: RM:
ARRESTING OFF: CAPPA, SAMUEL
SQUAD: UNIT:BCI
TOT: ECJ

R & I

SCIC/NCIC WANTED: TT#: ORI#: FP#: Y

WARRANTS

S# 0476503S NAME: FLORENCE, ALBERT
BWN# 98-04-01657-I
JUDGE: FALCONE, JOSEPH A.
CHARGE: VOP/HINDER PROSECUTION

CHARGES

INC# (S):

SUBJECT PICKED UP AT BURLINGTON PD AND TRANSPORTED TO ECCF/BCI FOR PROCESSING.

WARRANT# 4765-038

Appendix F

END OF REPORT

SIGNATURE: /s/_____
Superior Officer

SIGNATURE: /s/_____
Arresting Officer

APPENDIX G — ASSOCIATE WARDEN PRINGLE MEMO TO ESSEX COUNTY COUNSEL, DATED JUNE 27, 2008

COUNTY OF ESSEX
DEPARTMENT OF CORRECTIONS
INTERNAL AFFAIRS BUREAU
354 DOREMUS AVENUE
NEWARK, N.J. 07105
PHONE (973) 274-7500 FAX (973) 274-6972

To: Alan Ruddy, Assistant County Counsel
From: Stephen Pringle, Associate Warden
Date: June 27, 2008
Re:

The Essex County Correctional Facility, with an average daily population of 1923 inmates, ranks number one in the state. Averages of 25,175 prisoners are admitted to the facility each year. ECCF houses many types of inmates; county sentenced, pre trial, pending grand jury, municipal and out of county detainers, Federal Marshal detainees, Immigration and Customs Enforcement (ICE) detainees and State remanded prisoners.

The population consists of male, female and juvenile offenders. There have been over 2000 Security Threat Group members classified with a suspected average of 1000 STG members housed in our facility daily.

The Internal Affairs Bureau reports fourteen investigations of inmates being processed into our facility with contraband being found on their persons in 2007. This is a modest number compared to the contraband

found on a daily basis which includes weapons and CDS. Contraband has been found on newly admitted inmates, inmates returning from court, as well as inmates excepted from other agencies.

Procedures in place to help protect our staff and the inmates include the use of a walk through metal detector as well as a seated body orifice screening system. These tools, however, only detect the presence of metal on a person. They will not detect CDS or weapons made of material other than metal. Furthermore, contraband is traditionally hidden on the person. Either in a seam of their clothing or in their mouth, in a shoe or in their hair, in their underwear or in an orifice. With the [2] knowledge that they will be searched upon arrival to a correctional facility. detainees have become more ingenious as to where they hide contraband.

APPENDIX H — ATTORNEY GENERAL'S STRIP SEARCH AND BODY CAVITY SEARCH REQUIREMENTS AND PROCEDURES FOR POLICE OFFICERS

[SA-24]

Strip Search and Body Cavity Search
Requirements and Procedures

Attorney General's
Strip Search and Body Cavity Search
Requirements and Procedures for Police Officers
N.J.S.A. 2A:161A-1 *et seq.*

I. Definitions

A. Strip Search

1. Removal or rearrangement of clothing to permit visual inspection of a person's

a. undergarments

b. buttocks

c. anus

d. genitals

e. breasts

2. The following does not constitute a strip search:

a. removal or rearranging of clothing reasonably required to render medical treatment or assistance, or

b. removal of articles of outer clothing, such as coats, ties, belts or shoelaces.

B. Body Cavity Search

1. Visual inspection or manual search of a person's:

a. anal cavity

b. vaginal cavity

II. Search Requirements

A. Detention or arrest without custodial confinement

1. Strip Search

a. NO exigent circumstances:

(1) Search warrant or consent, and

(2) Authorized by officer in charge of the station house.

b. Exigent circumstances:

[SA-25]

(1) Probable cause to believe that the person is concealing a weapon, contraband or evidence of crime, and

(2) Exigent circumstances prevent obtaining a search warrant or approval of officer in charge.

2. Body Cavity Search

a. Officer in charge authorizes confinement in municipal detention facility or transfer to adult correctional facility, and

b. Officer in charge authorizes search and

c. One of the following:

(1) Search warrant, or

(2) Consent

III. Procedures

Appendix H

A. Strip Search

1. Conducted by person of same sex, and

2. Conducted in private, and

3. Conducted under sanitary conditions, and

[SA-26]

4. Conducted in a professional and dignified manner, and

5. In custodial confinement, conducted in accordance with Department of Corrections regulations

B. Body Cavity Search

1. Conducted by licensed physician or registered nurse of same sex, and

2. Conducted in private, and

3. Conducted in a medically acceptable manner and environment, and

4. Conducted under sanitary conditions, and

5. Conducted in accordance with Department of Corrections regulations

Appendix H

IV. Reporting Requirements

A. Officer who performs strip search or has body cavity search conducted must report the reason for this search on the record of arrest. The report must include:

1. A statement of facts indicating the reasonable suspicion or probable cause for the search;

2. A copy of the search warrant, if appropriate.

3. A copy of the consent form, if appropriate.

4. The name of the officer in charge who authorized the search.

5. The names of the persons conducting the search.

6. An inventory of any items found during the search.

B. If exigent circumstances were the basis for the search, the officer who conducted the strip search must file a separate written report stating the reasons for the immediate search.

V. Requirements and Procedures for Officer in Charge of Station House

Appendix H

A. The arrested person should be processed in accordance with R. 3:4-1, a summary of this court rule is attached, and, if applicable, with standard operating procedure adopted by the county prosecutor.

[SA-27]

B. Where appropriate, a person arrested in accordance with R 3:4-1 shall be released or have bail set without unnecessary delay but in no event later than 12 hours after arrest.

C. Unless authorized by search warrant or consent, a strip search should not be conducted if the arrested person will be released without custodial confinement or will soon be released on bail or own recognizance.

D. The officer in charge shall assure that a consent to a strip search or body cavity search is in writing whenever possible.

E. The officer in charge shall assure that all strip searches and body cavity searches are conducted in private and that these searches cannot be observed by persons not physically conducting the search.

F. When a body cavity search is conducted, the officer in charge shall request a sworn statement from the licensed physical or registered nurse

who conducted the search stating that the body cavity search was conducted pursuant to statutory and medical requirements.

G. All reports pertaining to strip searches or body cavity searches are not public records. These reports shall be made available, upon request, only to the person searched, the county prosecutor, the Attorney General or the Commissioner of the Department of Corrections.

VI. Procedure For The Processing of Suspects Arrested Without a Warrant

A. Always consult with county prosecutor for local procedures

B. A Summary of New Jersey Court Rule 3:4-1

1. A person arrested without a warrant for any offense shall be taken to the police station where a complaint shall be prepared forthwith.

2. A person arrested without a warrant for one of the following criminal offenses: murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault,

aggravated arson, arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes, shall be taken to a police station. The police officer shall comply with the criteria of Paragraph 5 below.

3. A person arrested without a warrant for an offense not listed in Paragraph 2 above, shall be taken to the police station where the * * * * *

APPENDIX I — COMPREHENSIVE AUTOMATED PROBATION SYSTEM, COLLECTIONS INQUIRY AND PAYMENTS MADE BY CLIENT, DATED MARCH 10, 2005

COMPREHENSIVE AUTOMATED PROBATION SYSTEM COLLECTIONS INQUIRY BY CLIENT

ESSEX 03/10/2005
PBM2333 13:41
JUPALEX

Warrant issued 4/25/03 last payment made 4/29/03 – fines are paid in full

CLIENT ID: F 0004610
CLIENT NAME: FLORENCE, ALBERT

PAYMENT PLAN INFORMATION

TOTAL AMT ASSESSED	1,574.00 (INC SUP FEE)	PYMT START DATE	07/19/1998
AMOUNT PER PAYMENT	46.00/MONTHLY	LAST PYMT DATE	04/29/2003
SUPERVISION FEE	/MONTH	LAST PYMT AMOUNT	1,310.00
TOTAL SUPERVISION FEE	1350.00	ACCEPT CHECK INDIV	Y

COLLECTIONS INFORMATION (ALL DISPS)			
PAID TO DATE	1,595.70	ARREARAGE DATE	
CREDIT TO BALANCE	1,574.00	TOTAL DAYS FROM START	
TRANSACTION FEES		NUMBER PAYMENTS DUE	
OTHER USER FEES	14.00	AMT SHOULD HAVE PAID	
OUTSTANDING BALANCE		AMT ACTUALLY APPLIED	
EXISTING ARREARAGE	0.00	CALCULATED ARREARAGE	

WARRANT CODE	ENFORCEMENT RISK CLASS: BW	NOTICE TYPE	CPSM
NO NOTICE REASON:		NOTICE DATE	04/07/2003
PB001076 CLIENT IS NOT IN ARREARS			
PF2 – DISP/ COLLECTIONS HISTORY INQUIRY	PF3 –	PAYMENTS MADE BY CLIENT	
PF4 – PAYMENT SCHEDULE HISTORY			

4© 1 Sess-1 172.16.1.27 TESS0233 1/2

Name: Shannon.Alexander – Date: 03/10/05 Time: 13:41:26

Appendix I

COMPREHENSIVE AUTOMATED
PROBATION SYSTEM
PAYMENTS MADE BY CLIENT

ESSEX
PBM2336
JUPALEX

03/10/2005
13:44

CLIENT ID: F 0004610
CLIENT NAME: FLORENCE, ALBERT

DATE PAID	AMOUNT PAID	PAYMT TYPE	PAYOR	PYMT STATUS	PYMT VENUE
04/29/2003	1,310.00	PERSONAL C		ALLOCA	ESX
12/10/2002		NON CASH		COURT	ESX
12/10/2002		NON CASH		COURT	ESX
06/17/2002	100.70	TAX OFFSET		ALLOCA	ESX
07/20/2000	25.00	CASH		ALLOCA	ESX
05/31/2000	50.00	CASH		ALLOCA	ESX
04/20/2000	50.00	CASH		ALLOCA	ESX
01/24/2000	50.00	CASH		ALLOCA	ESX
11/17/1999	10.00	CASH		ALLOCA	ESX

PF2 – PAYMENT INQUIRY PF7 – PRIOR PF8 – NEXT

4© 1 Sess-1 172.16.1.27 TESS0233 3/77

Name: Shannon.Alexander – Date: 03/10/05 Time: 13:45:03

APPENDIX J — WARRANT TO SATISFY JUDGMENT DATED OCTOBER 10, 2003

PROBATION DIVISION COUNTY OF ESSEX or Attorney for Judgment Creditor	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CRIMINAL
STATE OF NEW JERSEY Plaintiff vs. Albert Florence Defendant [REDACTED] Street Apt. [REDACTED] City [REDACTED] State Zip Code	District No. Colesx-2 Indictment No. 98-04-01657-1 Accusation No. Complaint No. Probation No. F-4610 Judgment # 265656-01 Total Amt. Of Judgment $1,574.00

WARRANT TO SATISFY JUDGMENT

TO THE CLERK OF THE SUPERIOR COURT:

Whereas Judgment was entered in the above entitled action in favor of the creditors named in the Judgment of Conviction and against the defendant as appears by the record there of in:

Appendix J

Judgment Docket Number **J# 265656-01**

NOW THEREFORE this is your Warrant and authority to enter on the aforesaid record this Satisfaction of Judgment.

Dated 10-10-03 */s/ Peter P. Conerly*
Attorney for Judgment Creditor or
Vicinage Chief Probation Officer

CERTIFICATION (Complete when warrant is executed by the attorney for the Creditor)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: _____
Attorney for Judgment Creditor or
Vicinage Chief Probation Officer

ACKNOWLEDGMENT (Complete when warrant is executed by Vicinage Chief Probation Officer)

STATE OF NEW JERSEY: COUNTY OF ESSEX

Be it remembered that on 10-10-03, before me the subscriber

Personally appeared Peter P. Conerly, Vicinage Chief Probation Officer

Appendix J

Of the Probation Division of the COUNTY OF ESSEX WHO, I AM satisfied, is the person named in, and who executed the foregoing instrument, and acknowledges that he/she signed, sealed and delivered the same as his/her act and deed, and as the act and deed of the Probation Division named in the instrument for the use and purpose therein expressed.

/s/ William R. McDowall
ATTORNEY AT LAW or NOTARY PUBLIC

APPENDIX K — BENCH WARRANT IN THE SUPERIOR COURT OF NEW JERSEY, DATED APRIL 25, 2003

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
BENCH WARRANT

State of New Jersey

vs.

Name: Albert Florence

AKA: _____

Ind. # 98-04-01657I
Charge: 30 Hinder Prosecution
PG # 98000062 Def. # 001
Trial List Falcone, J
Failure to Appear for: Enforcement

TO THE SHERIFF OF ESSEX COUNTY OR ANY LAW ENFORCEMENT OFFICER IN NEW JERSEY:

YOU ARE ORDERED TO TAKE INTO CUSTODY THE ABOVE DEFENDANT:

Address: [REDACTED] DOB: [REDACTED]
SSN: [REDACTED]

AND BRING HIM/HER BEFORE THE SUPERIOR COURT:

Appendix K

SITTING IN:

ESSEX SUPERIOR COURT
50 WEST MARKET STREET
NEWARK, NJ 07102

Issue Date: 4/25/03

/s/ Joseph A. Falcone
JUDGE OF THE SUPERIOR COURT

Court Clerk: */s/ Crystal Darby*

APPENDIX L — EXCERPTS OF TRANSCRIPT OF ORAL SWORN DEPOSITION OF JUEL E. COLE, DATED NOVEMBER 30, 2006

[1] UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
HONORABLE JOSEPH RODRIGUEZ
CIVIL ACTION NO. 05CV3619 (JHR)

ALBERT FLORENCE,

Plaintiff,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON; BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, individually and officially as warden of BURLINGTON COUNTY JAIL; ESSEX COUNTY CORRECTIONAL FACILITY; ESSEX COUNTY SHERIFF'S DEPARTMENT; STATE TROOPER JOHN DOE individually and in his capacity as a State Trooper and JOHN DOES 1-3 of BURLINGTON COUNTY JAIL and ESSEX COUNTY CORRECTIONAL FACILITY who performed the strip searches and JOHN DOES 4-5,

Defendants.

THURSDAY, NOVEMBER 30, 2006

Appendix L

Oral sworn deposition of JUEL E. COLE taken at the law offices of Parker McCay, PA, 7001 Lincoln Drive West, Marlton, New Jersey, on the above date, commencing at 10:15 a.m., there being present:

ALAN L. LESKY & ASSOCIATES
THE LEXINGTON BUILDING
180 TUCKERTON ROAD
MEDFORD, NEW JERSEY 08055
(856) 983-3282

* * *

[3]

WITNESS	PAGE
JUEL E. COLE	
Examination by Ms. Lask	4

* * *

[4] JUEL E. COLE, having been duly sworn, was examined and testified as follows:

BY MS. LASK:

Q. Hi, Warden. My name is Susan Chana Lask from the law offices of Susan Lask and Michael Calabro and we're the plaintiff's counsel as you know. This is regarding Albert Florence. You're familiar with the case?

A. Yes.

Q. Have you read the complaint in this action?

A. Yes.

Q. Okay. I'm going to ask you some questions. Have you ever been in a deposition before?

A. Yes, I have.

Q. Okay. Then basically you know that I'll ask a question. If you respond, I won't interrupt you, you won't interrupt me. If you have a question that you don't understand, just let me know and I'll try and rephrase it for you. Basically I really want you to know that I'm not going to ask trick questions. It's not a trick or anything. I really just want to find out certain answers to things we don't understand and get to the bottom of this. Okay?

A. Yes.

[5] Q. How long have you been warden of Burlington County Jail?

A. Since June of 1997.

Q. And what were you doing before then, what was your job position?

A. I was administrative captain.

Q. Of the same Burlington County Jail?

A. Yes.

Q. And how long were you administrative captain, from what year to what year?

A. Probably about a year, a year and a half.

Q. And before that, what was your job position?

A. Lieutenant.

Q. For the same jail?

A. Yes.

Q. And what years was that position?

A. That was approximately 1986 to 1996.

Q. What's your date of birth?

A. [REDACTED]

Q. So you're an Aquarius?

A. Yes.

Q. So am I. [REDACTED], what year?

A. [REDACTED]

Q. So before you were a lieutenant were you [6] also employed by Burlington County Jail?

A. Yes.

Q. What was your position then?

A. Sergeant.

Q. From what years?

A. I want to say approximately 1981 to 1986.

Q. Okay. And before that were you employed by Burlington County?

A. Yes.

Q. What position?

A. Officer.

Q. Would that be an officer at the Burlington County Jail?

A. Yes.

Q. Corrections officer?

A. Yes.

Q. And what years?

A. 1976 I started.

Q. Okay. Before that, what was your position?

A. Before 1976?

Q. Yes.

A. Part-time jobs. That's when I started at the jail.

Q. Before '76 were you in law enforcement jobs?

[7] A. No.

Q. So in '76 you started as a corrections officer at Burlington County Jail, is that correct?

A. Correct.

Q. And what was your training before 1976 as an officer? Before you became an officer, what training did you go through? Was there an academy, education?

A. The academy came after I started.

Q. Okay. So when you became a corrections officer in '76, then you went to an academy for training?

A. Yes.

Q. And how long was that training?

A. Approximately -- at that time it was about two to three weeks.

Q. And then after the academy was there any other training?

A. There has been various trainings throughout all of the years. Supervisory, first line supervision, all different types of training.

Q. You said you've read the complaint in this action?

A. Yes.

Q. When you became warden for the Burlington [8] County Jail, what year was that again?

A. 1997.

Q. Can you tell me your job description as warden?

A. Basically overseeing the whole operations of the correctional facility, everything from the operating procedures to budget, the overall operations of the jail.

Q. So with respect to the prisoners, would part of your duties include complaints from prisoners being reviewed by you?

A. Some of them, yes.

Q. Not all complaints would be reviewed by you?

A. It depends upon the complaint.

Q. Okay. If there was a prisoner that was in there that was complaining that they weren't arrested on a warrant, that they were the wrong person arrested, would that come to your attention?

A. If it wasn't rectified, yes, it would.

Q. Who would have to rectify it before it came to your attention?

A. Anyone making a complaint of like you said a wrongful warrant, they would try -- all warrants are basically checked out. Anybody that comes in on [9] a warrant the warrant's checked in the system.

Q. Okay. And who checks the warrant?

A. ID personnel.

Q. Okay. I think it was about March 3rd of 2005 that Albert Florence in this particular incident was brought to your facility, is that correct?

A. Yes, it is.

Q. March 3rd. Okay. And he was brought in by a Trooper Flynn, does that sound correct?

A. Yes.

Q. Trooper Flynn isn't part of the Burlington County prison system, correct?

A. Correct.

Q. When Trooper Flynn brought Mr. Florence in, could you tell me the process that Mr. Florence went through walking in the door of Burlington County Jail?

A. Anytime someone's presented to the jail for commitment, our ID personnel makes sure that the proper paperwork is present to commit that person.

Q. And how do they do that?

A. They check the paperwork. They make sure that the paperwork is valid. Be it a court order, commitment, be it a hold over in this case. They [10] make sure that it's valid.

Q. Okay. And how do they make sure it's valid, meaning do they check a computer system? Is that --

A. No, they look at the paperwork.

Q. So it's just viewing the paperwork. What paperwork are they looking at to see that it's valid?

A. It depends upon the type of commitment.

Q. In this particular case, what paperwork did they look at?

A. It would have been the hold over.

Q. Trooper Flynn brought him in. Did Trooper Flynn also have hold over paperwork?

MS. SAVAGE: I'm just going to object. He doesn't have personal knowledge. He wasn't sitting at the booking ID desk, so based on that, on that objection, he's speaking to his knowledge as a practice.

Q. Do you know if Trooper Flynn brought Mr. Florence to your prison facility?

A. By reviewing the paperwork, yes, I do know that.

Q. On that basis, what paperwork did Trooper Flynn bring to the facility for Mr. Florence?

[11] A. From the paperwork that I've seen, he filled out a hold over.

Q. Then maybe this is it. I'm going to show you documents that I received from your initial disclosure and this one says hold over, Burlington County, New Jersey. Is that the hold over paperwork?

A. Yes, it is.

Q. So would that be the paperwork that Trooper Flynn presented?

A. He filled this out when he got there.

Q. So am I correct that this officer or an officer, if they find somebody requiring a hold over, they have this kind

of paper in their vehicle maybe and then they fill it out or is this paper at the jail and they fill it out?

A. That paper's at the jail.

Q. Okay. Would there be anything else attached to this hold over paperwork or that a trooper or police officer would bring a hold over in with or is that the only thing that he fills out?

A. There could be more paperwork to this.

Q. In this case was there?

A. I don't know.

Q. Is this enough for Burlington County to [12] take the person into their custody?

A. Yes, it would be. I'm pretty sure it would be.

Q. This charge 2A:10-1C on this hold over paperwork, can you tell me what that charge is?

A. Off the top of my head, without looking at the 2C book, no.

Q. Okay. Once the hold over paperwork is filled out, what would be the next step? Would I be correct in saying the ID personnel eyeballs the paperwork and takes the prisoner into custody?

A. Yes.

Q. Okay. What happens after that?

A. There could be a lot of things happening. They could run the person in the NCIC. The trooper could have had what we call NCIC hit paperwork. There's various things that can happen at that point.

Q. What happened in Mr. Florence's case?

MS. SAVAGE: Same objection. He wasn't there personally. He can only speak to policies and procedures and his knowledge of practice. He can't speak to what happened specifically with Mr. Florence.

Q. Did you review this case before you came to [13] this deposition?

A. I went through the file.

Q. From your review, what happened, what was the next step?

A. I'm not sure what happened. I do know that they did do an NCIC check. I saw that paperwork in the file when I looked but exactly what happened, I'm not sure.

Q. What's an NCIC check?

A. That's a computer program that they look into to look up charges to see if there's any outstanding warrants or is the person wanted someplace else.

Q. Okay. So I'm going to show you another piece of paperwork from your initial disclosure and it says March 3rd of '05, priority message, hit confirmation response. Would that be the NCIC?

A. I'm not sure what this is. Most NCIC paperwork would have that name on it.

Q. I'll show you -- well, what is this? It was produced to us. Do you know what this is, Karen?

MS. SAVAGE: It's the response. It's the hit confirmation response reference form, and I believe there's another piece that is the actual –

[14] Q. This CJIS, is that part of it?

A. I don't know. I don't think -- I'm not sure. This is from CJIS. Criminal Justice Information System is what CJIS stands for.

MS. SAVAGE: Off the record.

(Off-the-record discussion.)

BY MS. LASK:

Q. This CJIS response has Trooper Jeffrey Flynn's number on it dated March 3rd of '05. It says New Jersey wanted persons inquiry results. What does that tell your officers at intake?

A. That there's -- he's wanted or there's an outstanding warrant or someone's looking for him.

Q. At the bottom there it says violation, and that statute I quoted 2A:10-1C says civil contempt. Do you see that?

A. 2A:10-1C civil contempt, yes.

Q. Is civil contempt a violation or a crime?

A. No, it's not an indictable charge. Is that what you mean?

Q. Yes. And is that showing what the charge was against him when he was brought in?

A. I don't know. I don't know when this came in.

Q. This CJIS form is March 3rd of '05. That [15] was the date he was in your custody, is that correct?

A. Yes, it was. But that --

Q. Do you know who generated this?

A. No, I don't.

Q. But this is one of the documents that you produced to us?

A. If it was in his file, yes.

Q. I'm going to show you another document produced to us called the Inmate Intake Record. Is that a document from your prison facility?

A. Yes, it is.

Q. And is this the document used at intake for Albert Florence?

A. If that's his inmate number, yes, it is.

Q. The number is HO5050. I'll show you a Burlington County Detention Center Inmate Property Inventory Sheet with the same number.

A. Yes.

Q. That would be his inmate number?

A. Yes.

Q. On this sheet it says civil contempt as the charge. So would that be the charge that he walked in with that he was processed with at your Burlington County facility? On the inmate intake [16] record sheet it says civil contempt, just to make the record clear.

A. Looking at this, this is the sheet that's filled out when an inmate comes in the facility, and this usually is right here. He came in as a hold over but I don't see why or what here. What I see here is a detainer. This could have been put on here when he came in the door or it could have been put on here a couple of days later.

Appendix L

Q. What's the difference between a detainer and a hold over?

A. A hold over is an inmate that's put in our facility by a police officer. A detainer is something that's added to the original charge that he's in there for. A detainer is just that. It's a detainer, it's something in addition to. This would have been when he came in or it could have been put on the next day.

Q. Does the HO by his inmate number 5050 mean held over?

A. Yes.

Q. So on this document he has an inmate number as an HO. Can he be an HO and a detainer at the same time?

A. A detainer, and my ID chief can explain it [17] better, a detainer is in addition to what you came in. A person comes in with a charge.

Q. Can a hold over come in and become a detainer?

A. A hold over comes in as a hold over. That's how the police officer lodges the inmate in. A detainer is another charge or a different charge or something else that comes in once the inmate is committed.

Q. So can a hold over have a detainer added to his hold over status?

A. Any inmate that comes in, if another charge comes up, yes.

Q. Okay. On this inmate intake record it should have been filled in on the left side of it where it says document number, hearing place, that top left box because he was a hold over?

A. No.

Q. No?

A. I believe what we'll find out from my chief of ID is a hold over is just that. A hold over for a particular committing agency.

Q. Okay. This inmate property inventory sheet and this inmate intake record, who fills them out?

A. The ID personnel.

[18] Q. Do you know who the ID personnel was that filled this out? Did they sign it?

A. The officer signed it here.

Q. Is there a name that's recognizable? If not, it's okay. You can't recognize it?

A. To recognize a signature but from reviewing the file, I can I think recognize it as C. Palmer.

Appendix L

Q. Am I correct, I was reading your rules the other day, that there's always two ID personnel on duty for processing?

A. There's two assigned there, yes.

Q. Would there be anything else that the ID personnel should fill out in addition to these two forms that we were just talking about?

A. Money card, there is a couple forms that could be filed.

Q. After the ID personnel fills out these two forms and maybe the money card and the property, then what happens in the process? What's the next step? Do they get fingerprinted and photographed?

A. They get fingerprinted. They get photographed. The nurse talks to them.

Q. Does the nurse fill out any kind of form?

A. Yes.

Q. Would that be in his file?

[19] A. That's it, I believe.

Q. No, that's --

A. No, there is one that the nurse fills out.

Q. So there's a nurse. Would she just ask health questions or would she fill out any other problems if the person was complaining that they were there on a misidentification or on a false warrant?

A. No, she would fill out health questions.

Q. After the nurse talks to the ID personnel then the nurse, then what happens? I'm sorry, it's ID personnel, fingerprinting, photograph, nurse?

A. All during the intake.

Q. Then what else happens during intake?

A. At some point in time they're Kwelled.

Q. So after the nurse or that intake process, who takes them to the Kwelling process?

A. One of the booking officers.

Q. Is a booking officer different than an ID personnel?

A. No.

Q. It would be one of the two?

A. One and the same.

Q. Two people that are on duty. Okay. Booking officer and ID personnel are the same. So [20] this officer will

then escort them to another section where the Kwelling is?

A. It's all in the same section. It's a shower area and it's all right in the same area.

Q. Do they do it one at a time?

A. Yes. One inmate at a time, yes.

Q. When they take them to the shower area, what is the process?

A. First one of the supervisors would ascertain what type of search is going to be done. If there's going to be a search before they're Kwelled. If there's no indictable charges, then they're just going to be Kwelled and changed over into a jail uniform.

Q. Is an indictable charge, does that mean a felony charge?

A. Yes.

Q. Not misdemeanor?

A. Correct.

Q. So then they determine if the person is non-indictable or indictable. If it's indictable, there could be a strip -- must there be a strip search?

A. No.

Q. What would be the basis on an indictable [21] charge to strip search?

A. If the charge is indictable charges or drug charges or reasonable suspicion I guess would be the word we're looking for. If there's reasonable suspicion to search, then there will be a strip search. If not, there won't be.

Q. What is your definition of a strip search?

A. A strip search is checking for contraband.

Q. Checking for contraband while clothed?

A. No, remove all clothes and checking for contraband. Open the mouth, check under the tongue, behind the ears, the hair.

Q. Does removal of all clothes mean socks, boots, everything?

A. Yes.

Q. Tell me how you authorize in your position as warden, because I saw you do make rules regarding strip searches, a strip search to proceed.

A. Remove all articles of clothing. You would check inside the mouth. You would check the hair. Just on the outside of the body for any type of drugs. Under the feet. Under the soles of the feet. Under the arms.

Q. And the person's completely naked?

A. Yes.

[22] Q. Are they told to turn around?

A. Yes.

Q. Why are they told to turn around?

A. Just to make sure that there's nothing attached to the back of the body or any parts of the body.

Q. Completely naked?

A. Yes.

Q. Are they told to bend over?

A. They could be.

Q. What is a body cavity search?

A. A body cavity search is only done by medical personnel.

Q. And describe what a body cavity search is.

A. Exactly that. They actually go inside different body cavities to make sure there's nothing hidden.

Q. Mouth, do they check the mouth?

A. Every opening.

Q. Anus?

A. Yes.

Q. Manipulate genitals?

A. Yes.

Q. And for women?

A. On women.

[23] Q. I'm sorry, what did you say?

A. You had said manipulate genitals.

Q. For men?

A. That's not a body cavity search for a man. For a woman it is.

Q. So can manipulating the genitals be part of a strip search?

A. No.

Q. It would always be part of a --

A. Body cavity search.

Q. So if it's a non-indictable offense, what is the procedure once a person's walking -- going to the Kwell process?

A. They would be given the Kwell. They would be given the jail uniform and they would be told to go in the shower. They would be told how to use the Kwell.

Q. How are they shown how to use the Kwell?

A. Well, there's directions on it. You put it in your hair and you leave it there for so many minutes and then you rinse it off.

Q. What is the Kwell, is it a bar of soap, is it a liquid?

A. It's a liquid. Gel type liquid.

Q. Can it ever be a bar of soap?

[24] A. I've never seen it as a bar of soap.

Q. So at what point do they determine if it's an indictable or non-indictable offense, based on the charge that comes in?

A. Yes.

Q. And then I'm going to show you the strip search authorization in this particular case dated March 3rd of 2005 and signed by a Sergeant Chilton produced by your counsel. Is that the strip search form used in this case?

A. Yes, it is.

Q. Okay. Now, would Sergeant Chilton be the supervisor of the booking person that determined how to execute that form?

A. Sergeant Chilton filled this form out.

Q. As a supervisor?

A. Yes.

Q. And then it's the booking officer that will go into the Kwelling area with the detainee or person in custody, correct?

A. Correct, or Sergeant Chilton could have went in there but usually it is the booking officer.

Q. So on this form Sergeant Chilton determined that the individual was not strip searched and none of the above factors were present, meaning there is [25] no reasonable suspicion or anything else, is that correct?

A. Correct.

Q. But it says that he was showered and Kwelled, is that correct?

A. Yes.

Q. And a visual observation was made for injuries. Is that correct?

A. Yes.

Q. That visual observation for injuries, what is your procedure for that?

A. While he's changing into a jail uniform or at some point in time while he's applying the Kwell, the officer makes a quick check to see if there's any bruises, any -- anything -- any tattoos, certain tattoos, any item like that of any importance.

Q. How is that quick check executed?

A. Just by the officer observing.

Q. The person in the shower naked?

A. Either in the shower or while he's changing.

Q. So they take a visual look at the naked person either changing or showering?

A. Yes.

Q. That's for both non-indictable and [26] indictable?

A. Yes.

Q. So to take a quick look, would they have to view the body up and down, front and back?

A. Not all the time, no.

Q. If they're looking for visual marks, bruises or some kind of identifying tattoo, wouldn't they want to see more than just a quarter of the body if that's the purpose of the visual observation?

A. Yes, but they don't always --

Q. Sometimes they do?

A. Sometimes they do, sometimes they don't.

Q. What would be the difference then between your definition as warden for this Burlington County procedure of a visual observation of the person naked between a strip search and visually observing a person naked?

A. Repeat that, please.

Q. You as a warden put out policies and procedures that I've reviewed that you've provided us. You obviously have a procedure for visual observation while the inmate's Kwelling. Correct?

A. Yes.

Q. You gave me your definition of a strip [27] search as a visual observation of a person naked earlier?

A. Well, they happened to be naked, yes.

Q. In the strip search or in the Kwell?

A. Both.

Q. So what is the difference between a visual observation and a strip search?

A. I guess the best way I could answer that is importance. One person's coming in with indictable charges. Drug charges. Or he's a known drug addict. And when I say importance, it's making sure that they're -- there's no chance of them bringing something into the jail. And that's the reason for the strip search. To make sure that no contraband, weapons, knives, drugs, et cetera, are brought into the facility. First of all, the Kwelling is done to keep body lice, et cetera, from running rampant inside the jail, and then we also ask, we don't just look, we ask do you have any tattoos or any such things because obviously inside a facility you have somebody that's taking a shower on a wing and you have certain tattoos that subjects him to -- may subject him to harm. So we want to know about any tattoos or body marks. We also want to know about any -- we ask too, we don't always get a truthful [28] answer, we ask for information about do you have any cuts, bruises, did anything happen to you when you came in because we want to know that for later on. That's the best way I can answer the difference and the reasoning between a strip search and just observation.

Q. Right. I understand the reasoning. But am I correct that visual observation they're viewed naked and the strip search they're viewed naked?

A. Everybody's changed over. When it happens, it happens. While they're changing, while they're showering, while they're in that intake booking area.

Q. If a booking officer said to an inmate take off your clothes, turn around and viewed them naked, would that be a strip search?

A. Not necessarily.

Q. Why not?

A. If you're going to strip search somebody, you're going to check everything.

Q. Well, am I correct that there's strip search and then there's body cavity searches, meaning -- let me rephrase it. Are you familiar with the New Jersey statute's, the definition of strip search and body cavity searches?

[29] A. Body cavity -- we don't do body cavity searches.

Q. Only a medical person can do that, is that correct?

A. Yes.

Q. Are you familiar with -- but still when it comes around, you would have to know the statutory meaning or definitions of --

A. Body cavity searches, strip searches.

Q. Are you familiar with the definition?

A. Yes.

Q. So I'm going to read you New Jersey Statute 2A:16-1A3. It says for the purposes of this act, the strip search means the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts. Does that sound familiar to you?

A. Yes.

Q. So is a visual observation of the person naked a strip search according to that definition?

A. No.

Q. Why not?

MS. SAVAGE: Could you show me what you're referring to?

MS. LASK: The statute. I bolded it.

[30] What I just read.

Q. Does that definition that we just read fit what we talked about earlier, viewing a person naked?

A. That's not -- I read the rest of it too.

Q. Okay. We'll read the rest. It does not include any removal or rearrangement of clothing reasonably required to render medical treatment or assistance or the removal of articles of outer clothing such as coats, ties, belts. We don't care about the removal of outer clothing.

A. But all clothes are removed to change over into a jail uniform and all clothes are checked. Like I said, the reason that they're Kwelled is for purposes of keeping certain things outside the jail.

Q. I understand that. That's valid. But when a person is viewed naked, that is a strip search according to the New Jersey statute that I just read, does that sound correct?

A. I disagree with that.

Q. If I directed you to take off all of your clothes, is that a strip? Am I directing you to strip?

A. I mean we can have semantical words but.

Q. I'll do it the other way. If you directed [31] me to take off all of my clothes, you're a warden, you're an officer, and if you directed me to take off all of my clothes, just that part, are you directing me to strip?

A. I'm directing you to change over into a jail uniform.

Q. If you directed me to take off all of my clothes in front of you, are you directing me to strip?

A. The definition of strip, yes.

Q. If you watched me for five seconds naked standing in front of you, is that a search?

A. By our definition, no.

Q. And if you told me to turn around naked in front of you, is that a search?

A. Again, by our definition, no.

Q. Okay.

(Brief recess.)

BY MS. LASK:

Q. I'll show you another document that was produced by your counsel and it's a Comprehensive Automated Probation Systems Disposition Information Inquiry, March 4, '05, and at the bottom is a Donna Hardney. Is that a person you're familiar with? Is that a document generated by you?

[32] A. I don't know who Donna Hardney is, and I'm not sure what form this is.

Q. Okay. So would that be a document generated by --

A. It could have been -- it's -- I don't know.

Appendix L

Q. Let me ask you a question. On a warrant for this particular plaintiff, you understand that the claim is that the warrant was satisfied years before he was brought in as a hold over into your facility, correct?

A. Yes. I know that he says the warrant was satisfied. I don't know how long before but I understand that he said it was satisfied.

Q. Am I correct in saying that his claim is that it was satisfied when the complaint was served or did you know it -- have you heard that complaint while he was in your prison facility in March of '05?

A. I don't know when we heard. I mean I do know that his claim supposedly was true. And, you know, whenever we heard that it's true, we found out it's true, of course we took action on it. But exactly when we found out, I don't know.

Q. He was brought March 3rd of '05 and he didn't leave your facility till March 9th of '05, is [33] that correct?

A. I'm not sure the exact dates but if that's what the record states, yes.

Q. Hold on. Let me get it right for you. I believe he left March 10th of '05. But either way it was about six or seven days stay at your facility, is that correct?

A. Yes.

Q. In a hold over situation like this, is it typical to take six or seven days before the hold over's picked up by the county issuing the warrant?

A. Typical is a word we don't use very often. But there are some that's longer. There are some that it's only a couple of days. Typically we say a hold over is usually 24 to 48 hours.

Q. Are you aware of any statute or law that a hold over must or a detainee must go before a magistrate within so many hours or days of being brought in?

A. No, I'm not fully aware of that.

Q. What did your facility do in this particular case to get this hold over moved to Essex County?

A. Again, the hold over was put in by a police department and it's my understanding that the police [34] department will take care of that hold over.

Q. You mean the police department where Officer Flynn brought him in?

A. Yes.

Q. Officer Flynn was not from Essex County, is that correct?

A. I don't believe so, no.

Q. Once an officer brings a hold over into your facility's possession, doesn't your facility have the responsibility to move that hold over out of there?

A. I -- I'd like to check with my chief of ID but I don't believe so.

Q. What is the process when a hold over arrives, meaning would the first process be that the ID personnel at intake would call the county that the hold over is from?

A. For sure. If we knew it was a warrant out of another county, we would contact that county.

Q. Would the contact be immediately upon intake?

A. It would be immediate. It may not be while he's being processed in but yes, it would be immediate.

Q. Meaning within 24 hours at least?

[35] A. Yes.

Q. Is there a rule for that in your policies and procedures?

A. I would have to check that. But it's not our policy or intent to keep people any longer than we have to. As a matter of fact, there are people that are turned away when police officers do come without the proper paperwork.

Q. In this particular case did you check the file as to what happened, why this hold over was kept for six or seven days at your facility?

MS. SAVAGE: Objection. What time period are you referring to?

MS. LASK: March 3rd to --

MS. SAVAGE: I'm not clear. When do you think he checked the file? When are you asking?

BY MS. LASK:

Q. At any time since 2005, since March 3rd, 2005 to this date did you review the file to discover what your facility did to move this hold over?

A. Yes, I did look at the file and I saw that he was legally committed to our facility, and I also saw, like you said, that he had made claims that he had satisfied the issue beforehand and I was assured [36] that everything that we did was proper.

Q. Okay. What did your facility do that was proper to move this hold over to Essex?

A. First of all, we're not going to move him. We're going to notify Essex that he's here, and I'm pretty sure that that was done.

Q. By phone call?

A. I believe so.

Q. Is it usually just by a phone call that they call the other county?

A. Yes.

Q. And how many calls do they make, one, or do they do follow ups?

A. We do try to get the person out of our facility. I can't say how many times it was.

Q. You obviously reviewed the file. Tell me what went wrong in this particular case where Mr. Florence's warrant was satisfied yet he was kept.

MS. SAVAGE: I'm going to object to the form. What went wrong.

Q. I'll show you a Comprehensive Automated Probation System Report. It's now dated March 10th of 2005. It says Essex in the left hand corner. It was produced by your counsel. Is this something that was generated by your office? At the bottom [37] the name is Shannon Alexander.

A. Again, I don't know. I don't think so.

Q. Do you know what kind of form that is? Have you seen those type of forms before?

A. I've seen lots of different forms.

Q. Are you familiar with that one?

A. It looks like a form that states -- it says payment plan, basically says that a fine was assessed and the fine was paid.

Q. When does it say the fine was paid?

A. It says the last payment date was 4/29 2003.

Q. When was Mr. Florence brought to your facility? March 3, 2005, correct?

A. That was the day, yes.

Q. Does your facility have the ability to check that Comprehensive Automated Probation System to see if a warrant was satisfied?

A. I'm not sure. I'm not sure. I don't know if this was in there. I haven't compared all the forms. I just looked at the forms that were there when he was brought in. They would have checked that, first of all, that it was a legal hold over, and they would also have to check to see when the other detainers were put on.

[38] Q. So from March of 2005 to this date, can you tell me what went wrong? Was this hold over who was in your custody on a warrant that was satisfied?

A. I can't answer that.

Q. Did you ever review this file to come to the conclusion or figure out why Mr. Florence was in your custody on a warrant that didn't exist?

A. The warrant did exist. The hold over did exist when he came to our facility.

Q. How do they check that that hold over existed? Is there just because --

A. No, no, the hold over is what the trooper filled out.

Q. I'm sorry, the warrant. How do you confirm a warrant exists?

A. I don't know if he -- he obviously pulled it up on the CJIS system or NCIC.

Q. That's Trooper Flynn?

A. Yes.

Q. Based on a trooper bringing a person to your facility, his statement that yes, I've checked my computer system, this person has a warrant, that's as good as your facility needs to --

A. I thought I saw in the file, if I'm not mistaken, I have hundreds of files, that there was [39] an active warrant on that date.

Appendix L

Q. That would have been a computer generated document?

A. That would be a copy of it that would show that it was in the system.

Q. What system would that be?

A. Either the NCIC or the CJIS, I'm not sure which one, if not both.

Q. Whose responsibility is it to update the systems to show that a warrant has been satisfied?

A. That's a good question. I can't answer that.

Q. Are you familiar with a Shannon Alexander, is she one of your employees?

A. No.

Q. I'm going to show you a document that says Warrant to Satisfy Judgment and it's to the Probation Division, County of Essex and it has Superior Court received date of March 4, 2005 stamped above, and at the bottom it says that on October 10th of '03 a warrant for Albert Florence under judgment number 265656-01 was satisfied, signed by the vicinage chief probation officer, is that correct, what I stated?

A. Yes.

[40] Q. Is that a document -- not that particular document but that form -- something you're familiar with that you've seen to satisfy warrants?

A. A form similar to this in Burlington County?

Q. Yes.

A. Yes.

Q. Does that look like a proper form for a satisfied warrant in this particular case for Albert Florence signed by the proper parties and stamped by the court?

A. Yes, it does.

Q. If that form was produced to Essex County as a satisfaction of the particular warrant that brought Albert Florence to your facility, would you know where or who in Essex County should have documented that in the NCIC or CJIS system?

A. No.

Q. Would your facility check the NCIC and CJIS to confirm what Trooper Flynn said when he brought the prisoner in, that a warrant was outstanding?

A. If there's any complaints, yes.

Q. And is that as far as they would go, they check the computers and they rely on what the computer system says?

[41] A. Yes.

Q. So where we're at now, is it your understanding at this point that a warrant did not exist for this particular person at the time that he was brought in?

A. No.

Q. Why not?

A. Because there had to have been a warrant existing for him to come to jail.

Q. Right. At the time. But at the time in March 3rd of '05 it was your facility's understanding that a warrant existed because the computers showed that a warrant existed and Trooper Flynn brought him in stating a warrant existed, is that correct?

A. He brought him in and at some point in time I see that in his file a copy of the warrant was put in there, yes.

Q. Since 2005 and your review of the file and this case file is it your understanding that a warrant at the time did not exist, that the computer -- the warrant was satisfied from -- is it your understanding at this date that the warrant was satisfied?

A. At some point, yes.

[42] Q. At some point you discovered that the warrant was satisfied?

A. Yes.

Q. And you discovered that the warrant was satisfied before he was brought in March 3rd of 2005?

A. It appears that, yes.

Q. When a person comes into your facility they're given a welcome kit I think it's called with toothpaste, toothbrush?

A. Yes.

Q. Every person's supposed to get that?

A. Yes.

Q. Is every person supposed to speak to a social worker?

A. Not necessarily.

Q. Why wouldn't this particular case speak to a social worker?

A. Why wouldn't a hold over speak to a social worker?

Q. Yes.

A. Because they're not going to be there very long.

Q. What is the purpose of the social worker?

A. To talk to the person, to see if they have [43] any problems, any emotional problems, set them up to see a psychiatrist if need be. That's the main intent when they first come in. Mainly where they're going to go when they come out of the initial intake. All inmates for the first 24 hours, 48 hours, up to maybe I think 72 hours are segregated.

Q. If a hold over is not going to be there very long, does that mean 24, 48 hours, they shouldn't be there that long? In this case he was there for six or seven days. Would he have had a right to speak to a social worker?

A. If he had requested to speak to one, yes. It's not our normal procedure for hold overs to see social workers but if he had requested to see a social worker, he would have. The officers are always on the tier right there to help take care of their needs. The supervisors walk around twice a day. Each of them, they'll take care of their needs.

Q. If you as the warden found out your COs or correction officers didn't allow someone's request to speak to a social worker, would there be any kind of discipline? Would that violate your rules or procedures?

[44] A. If someone requested to speak to a social worker and they had a reason to, they would be allowed to speak to that social worker.

Q. Would a good reason be that they were there on a warrant that did not exist as far as they knew?

A. That would have -- that request would have went to ID.

Q. What would ID have done?

A. They would have checked it. They would have checked the warrant. They would have ran it. They would have contacted the necessary county. Like I said before, we want to get as many people out as we can.

Q. So if they called Essex and Essex said no, we have it here in the computer that there's a valid warrant, that's good enough an answer for Burlington even if the prisoner's protesting that he paid that warrant and it's not outstanding?

A. We would have to have something there holding him.

Q. Okay.

A. I'm pretty sure somewhere in this paperwork there is a legal document saying that that warrant existed along with that hold over that the police officer filled out.

[45] Q. If you discovered that your officers had a prisoner strip searched when they were not an indictable and there was no reasonable suspicion, what would your policy be towards that kind of action?

A. Our policy is what it is. Indictable charges we strip search, non-indictable, strip searches, no.

Q. I mean toward the officer. If an officer violated your rule and was strip searching people that were not indictable without reasonable suspicion.

A. Every officer that violates policy and procedure is disciplined.

Q. How many officers in the last few years or three years have been reprimanded for violating that procedure, the strip search procedure?

A. Off the top of my head, I can't remember.

Q. But about how many?

A. That doesn't happen very often.

Q. More than ten?

A. It's hard to say.

Q. But does it happen?

A. Somebody not properly filling out the paperwork, leaving blanks, yes. That's happened.

[46] Q. What about somebody strip searching people that should not be strip searched?

A. I can't remember that happening.

Q. Do you recall any complaints regarding that?

A. No.

Q. Has your facility been the subject of a lawsuit or you the subject of a lawsuit for an unauthorized strip search before?

A. No. I can't remember.

Q. I'm going to show you the strip search authorization form again signed by Sergeant Chilton. Is there a date there that you see on that form?

A. No.

Q. Is there a time on that form?

A. It looks like he time stamped it and did that in lieu of the date because it's a copy. It's hard to read.

Q. Is the body search sheet attached to that? The rest of the papers or just everything else that your counsel's provided. A body search sheet, let me see. That should be according to your rules attached to every strip search authorization form, is that correct?

A. Well, I'm not sure about that.

[47] Q. Okay. Well, at the bottom it says that a visual observation was made, is that correct?

A. Yes, it does.

Q. Now, in your policies and procedures section 1277 that your counsel provided it says number 5A, a body search sheet must be completed by the booking officer who actually performed the body search or made visual observations of the inmate's body, and those are your rules. Does that sound correct to you?

A. Yes. If that's what you just read, that's --

Q. I'll show it to you. I yellowed it for you. Highlighted it. Should there have been a body search sheet attached to that? I suspect that body search sheet is an outline of a person's body and it would show visual marks or anything like that.

A. Yes.

Q. Should that have been attached?

A. Yes.

Q. If it's not attached, would that be violating the strip search procedure?

A. It would be violating the policy, yes.

Q. What happens when officers violate policy?

A. The first thing I would have to see where [48] the body strip search is. I don't know if it got misplaced. Usually there is a body strip search on everyone. It's part of the paperwork. It's part of the packet.

Q. I know what it looks like. I just want to see it. Does that happen often that the papers aren't always filled out completely on the visual observation papers?

A. When it's not filled out or when it's misplaced?

Q. Here it is. In December of 2005 we've asked for your files quite a few times as your counsel knows, and we've actually received duplicates of that from your counsel. So that is the complete file that we've received from your counsel. There was no body search sheet attached. So if the body search sheet isn't part of Mr. Florence's file, then I'm correct in saying it's a violation, they didn't properly fill out the paperwork?

A. They either didn't properly fill it out or it's misplaced.

Q. Where would it be by any chance?

A. I wish I could answer that.

MS. SAVAGE: May I see that body [49] search? I just want to see if it's the back of a page, in other words, if it's two sided.

MS. LASK: It's not.

Q. Page 208 of your section 1186, that would be what your counsel produced as part of your production of documents. That would be the body search sheet that should be attached?

A. Yes.

Q. And it should be signed either there's marks or there's not marks after a visual observation during the Kwell procedure?

A. Correct.

Q. We're concerned or you're concerned about these marks to identify the person basically?

A. No. Well, no, identify any problems because of injury that he may have or tattoos.

Q. Would you be interested in tattoos to identify gang members as well?

A. Yes.

Q. So if a person came in on a non-indictable offense and they were Kwelled and visually observed, your officers at all times would want to see tattoos to check if they were part of a gang.

A. They're going to ask those questions too.

Q. But barring that most times people won't be [50] forthright, they're going to definitely look for tattoos?

A. Yes.

Q. And that's during the Kwell process?

A. That's going to be one of the things they look for, yes.

Q. And they do that also on indictable offenses as well?

A. Yes.

Q. Now, from what I recall you said the inmate can be visually observed in the shower or while they're undressing, either way?

A. Yes.

Q. So then would that correct your answer to your November 28, 2006 Answers to our Interrogatories that the inmate is then left to shower in private? That's not exactly on point. We had asked the question -- well, you had told us your strip search procedures include a visual check, a brief view of the inmate's body to ascertain bruises, scars, tattoos. This is in your written answers, number 21, your answer to our Interrogatory?

MS. SAVAGE: Are these the more specific?

[51] MS. LASK: Yes, they were amended. November 28, 2006.

MS. SAVAGE: Those answers were not certified. We went over them.

MS. LASK: So should I scratch that?

MS. SAVAGE: No, he will answer fully.

Q. You're talking about the visual observation part. It says the inmate is then left to shower in private, but that isn't always true, he could be showering and a visual observation could be made of him?

MS. SAVAGE: I'm going to object. The warden does not do this personally. He's not in the shower room with inmates but his understanding of the policies procedures and practices.

Q. The policies are made by you, correct?

A. And I have done it.

MS. SAVAGE: I meant in this particular instance.

Q. In the past, that's true. We'll go by your experience. When was the last -- the very last time that you've ever conducted a visual observation at Burlington County Jail?

A. As a supervisor, probably in the eighties. But even walking through now, somebody's at the [52] counter and they're emptying their pockets. They empty all their pockets of what they have in their pockets, et cetera. Then they're taken behind a closed door or a shower and they're told to take off all their clothes. The officer's there, he's taking the clothes and he's checking them for, you know, cleanliness. As they take off their clothes, he's taking their clothes and putting them aside on a bench. Anytime

during that time he could be checking the arms, he could be checking the torso, he could be checking areas for what we're looking for. Like I told you before, it depends upon the severity of the person he has standing in front of him.

Q. Meaning the indictable or non-indictable offense?

A. Exactly. The reasonable suspicion. If the charges say it's indictable, he's got somebody -- I'll say indictable charges, he's going to step back and he's going to do it a little different. If he's got somebody in there for traffic, he'll take the clothes, here's the Kwell. You put it in your hair, you lather it up and put it on for ten minutes.

Q. While they're naked?

A. They're taking the clothes off at the same [53] time. He'll gather up the clothes up, put them in a plastic bag. Here's the jail uniform. Here's the Kwell. He'll leave them in there.

Q. In this particular instance Mr. Florence states that he was naked and in the shower room with the officer. Does that sound like something that's a visual observation?

A. At what point in time on this case that the officer walked out, I don't know. But you know, they don't know -- I can tell you that they don't stand there and watch them while they shower.

Q. You mean you don't know?

A. Most cases they don't.

Q. And some cases they do? I don't want to beat it but some cases they do?

A. I will leave the officers answer that.

Q. Who was the particular officer on this one? He remembers a heavy set mid forties guy with glasses, Caucasian. On this particular date there were only two booking officers.

A. Gallagher.

Q. Is he coming in?

MS. SAVAGE: He's slated for the 7th, December 7th.

Q. This facility of yours, how many cells are [54] there?

A. Around a hundred and 60 something. But I -- when I'm looking at a chart, I don't know exactly.

Q. About a hundred 60?

A. Yes.

Q. How many people in each cell could be held?

A. It's built for two.

Q. And about how many people, what's the average that come in that are processed a day?

A. I want to say approximately 20.

Q. So could we say about a hundred or more, about a hundred 40 a week?

A. Approximately, yes.

Q. And it's Burlington County so how many indictable offenses do you average weekly or of those hundred and 40, is it a half?

A. That's a statistic I never really looked at.

Q. Do you get a lot of traffic tickets, traffic offenses?

A. No.

Q. How is your computer system set up with respect to the intake of each person? Let me scratch that. Does each prisoner have his or her [55] own file?

A. Yes.

Q. Is it a manila file, is it a folder file where there are pictures?

A. Yes.

Q. How long are those files kept?

A. That recently changed.

Q. When did that change?

A. I want to say it recently changed. I want to say -- I'd be guessing. At one time I think every file had to be kept 60 or 80 years. Now every file is only kept 30 years. You're asking me to quote.

Q. Okay. But you still have files from two, three years ago?

A. Yes.

Q. And where are they located?

A. In the jail.

Q. And those are physical, the physical files. Where in the jail, a records room?

A. Yes.

Q. Are those files scanned in any way or kept on computer tape?

A. No.

Q. In the file would be the intake, the strip [56] search form and other fingerprints, things like that, the original intake paperwork?

A. Yes.

Q. Would there be any other notes or anything, the social worker notes?

A. Social worker keeps a file.

Q. A separate file?

A. Yes.

Q. When a person comes to your facility, a prisoner, I suspect some kind of computer record is also made of their name, their date of birth and the charge, would that be correct?

A. Yes.

Q. And who does that? Is it the ID personnel?

A. The booking personnel would start it and then the ID personnel or other ID personnel in the computer room would finish it.

Q. Where are those computer files with the person's name and charges and identifying information?

A. That's in the computer?

Q. Yes. Is it in your jail's computer?

A. That would be I believe CJIS.

Q. Is CJIS a statewide system?

A. Yes, I believe it is. Criminal Justice [57] Information System.

Q. You're connected directly to them when you do the input?

A. Yes.

Q. Do you keep your own separate file or do you keep your own separate computer file on every intake that comes in?

A. Then, no.

Q. When?

A. We're implementing that now.

Q. So you haven't done that in the past?

A. No.

Q. So once you input it to CJIS, it goes directly to CJIS?

A. Yes.

Q. And you have no back up or storage of that?

A. We have access to CJIS.

Q. And how is that? You have access to CJIS. Do you have access to CJIS to print out every person that was in the Burlington County facility in the last two years?

A. I would have to check that but I believe we do.

Q. Do you know what kind of -- is it a green screen system, the CJIS?

[58] A. CJIS used to be a green monochrome screen but I believe they changed it to Windows based within the last couple of years or last year.

Q. And all the files even from two years ago, are they now in the Windows based -- they could be accessed through the CJIS Windows based?

A. I believe so, yes.

Q. So if I told you that I would like to have the information for every person that was taken into custody into your prison facility from three years to today's date, could you manipulate that information just for Burlington County from CJIS?

A. Easily?

Q. Yes or no.

A. I believe it can be done.

Q. And how can it be done?

A. I'm not sure.

Q. A hundred and 40 people that we estimated a week, it's almost a thousand a month, maybe 12,000 people a year, does that sound correct?

A. Yes. Times six or seven sheets each.

Q. For each person. On those sheets would it show if the person had a prior prison term or prior criminal convictions?

A. I believe it would show everything.

[59] Q. With Windows based can we say that these kind of things could be burned on a disc or DVD rather than printing out 60,000 pages?

A. I'm not sure.

Q. How long would it take you to get us that information if we asked?

A. Quite a while.

Q. How long is a while?

A. I'm waiting for the answer to that question also.

Q. From CJIS or your computer people?

A. Both. My computer people are contacting.

Appendix L

Q. Now, if we wanted the names of -- I'm sorry. How many of your inmates are female usually of the hundred and 40?

A. Very small percentage.

Q. So there's a women's section to the prison and a men's section?

A. Yes.

Q. I'm almost finished.

MS. SAVAGE: Can we just take a break?

(Brief recess.)

BY MS. LASK:

Q. As part of your duties I believe you explained that you authorize or create the policies [60] and procedures of the prison system, is that correct?

A. Yes.

Q. How do you create those policies and procedures? Is it with a group of other people, do you do it on your own, do you confer with attorneys? Those policies and procedures, how are they created?

A. All of the above. We have a group of lieutenants, sergeants that constantly review the policies, the existing policy and procedure and update it as necessary.

Q. Getting back to the famous strip search issue then, your section 1186 is the strip search policy and procedures in your facility, correct?

A. Yes. If that's what -- I don't remember all the numbers.

Q. You don't remember the number? Do you want me to show you just so we're on the same page literally? Do you recall when you created section 1186? I recall seeing a 2004 date on it. Does that sound about right?

A. Yes.

Q. What you produced or your counsel produced on your behalf is eight pages of section 1186 with the strip search authorization and page 208 of the [61] body search sheet. Effective date January 1st, 2004, approved by Juel E. Cole. I'll show that to you and I just want to find out particularly how that procedure came into effect. What is the review process to create this language? What do you use to create that particular procedure?

A. This particular procedure was an update of previous procedures. And, you know, change in laws, different problems that we have dictate any changes that we may make when we review it.

Q. What changes were made from the previous procedure culminating into this one?

A. I don't remember very many changes being made at all. I can't remember the changes from the last one to this one.

Q. Okay. And do you have the final decision before this procedure is implemented in black and white?

A. Yes.

Q. When you make that final decision or before you make it, do you confer with legal counsel to insure that it is --

A. Not always.

Q. Do you recall if you did on this January 1st, 2004?

[62] A. I don't believe we did. There's always discussions with legal about different things at different points while we're redoing it, but as far as actually discussing it with them prior to putting it out, I don't believe we did.

Q. Are you familiar with the Fourth Amendment Rights for reasonable searches including strip searches?

A. Yes.

Q. How would you define that with respect to strip searching? What is your understanding of the Fourth Amendment with respect to unreasonable searches including strip searches?

A. I don't understand your question.

Q. How do you understand the Fourth Amendment with respect to unreasonable searching of persons in your custody?

A. Back to basically what our policy says that without cause or reasonable suspicion, that you're -- don't do it.

Q. Are you familiar with New Jersey District Case Law regarding strip search procedures?

A. I've seen several different case laws on it.

Q. Do you recall one Davis versus County of [63] Camden?

A. Yes.

Q. You're familiar with that?

A. Yes. We were talking about that.

Q. What is your understanding of that case law as it applies to strip search?

A. I don't remember exactly but I do remember talking.

Q. Talking about it with whom, your counsel?

A. Yes.

Q. If a court of law would order your facility to stop visual observations of persons taking showers or applying Kwell, would your facility abide by that order?

A. I abide by all state laws and court orders.

Q. Would your standard operating procedure include persons to strip naked, submit themselves for visual inspection for marks or injuries and told to bend, squat and cough to insure that a person was not attempting to smuggle contraband in the jails?

A. Would our strip search policy?

Q. Your standard operating procedures.

A. For strip search?

Q. For strip search.

A. Yes.

[64] Q. Again, that's only applied if it's an indictable or reasonable suspicion?

A. Correct.

Q. It's Davis versus City of Camden by the way. Did I say that?

MS. SAVAGE: I think so.

Q. Does a charge for civil contempt mandate or require at any time a strip search?

A. No.

Q. Can you have a body cavity search without being strip searched first, meaning does strip search always come first and then a body cavity search or it's all inclusive?

A. I guess it would be all inclusive. Like I said, a body cavity search would definitely have to be done by medical personnel in a medical setting.

Q. This particular plaintiff, he was not being detained on a felony, is that correct?

A. That's correct.

Q. He was not being detained on a serious crime, is that correct?

A. I'm not sure what the crime was. I just know it wasn't an indictable offense.

Q. Is there a magistrate available at all times 24 hours in Burlington County to bring [65] prisoners before?

A. I don't believe so. I'm not sure.

Q. Is there a magistrate available six days a week?

A. I'm pretty sure there's an on-call judge. But I'm not sure.

Q. Am I correct then if this plaintiff was a hold over, is it your position that a magistrate in Burlington County had no jurisdiction over him?

A. Again, I'm not sure. I would be guessing at anything I would say. But I don't believe he would have seen one in Burlington County.

Q. What did you say?

A. I don't believe he would have seen a judge in Burlington County.

Q. Would that be because the warrant emanated from Essex?

A. Yes.

Q. Does a hold over require a probable cause hearing at any time?

A. I'm not sure. I don't believe so.

MS. LASK: That's got to be it. Unless you have any questions.

MS. SAVAGE: I don't have any questions. I just want to put a statement on the [66] record regarding those three documents.

MS. LASK: It was more. I'm going to give you the Comprehensive Automated Probation System dated

March 4th of '05. The same thing dated March 10th of '05. A second page of that, a warrant detail of March 10, '05. I'm going to give you an Essex County Sheriff's Office Warrant Workup dated March 9th of '05. I am pretty sure I gave you that already. I'm going to give you a Superior Court of New Jersey from Trenton document.

MS. SAVAGE: Just for the record, the warden was questioned regarding some of these documents and he had not seen them because they were not part of the Albert Florence jail file from Burlington County. Thank you, Warden.

MS. LASK: Thank you very much.

(Deposition concluded.)

APPENDIX M — EXCERPTS OF ORAL SWORN DEPOSITION OF JERRY COLEMAN, DATED NOVEMBER 30, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
HONORABLE JOSEPH RODRIGUEZ
CIVIL ACTION NO. 05CV3619 9(JHR)

ALBERT FLORENCE,

Plaintiff,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON; BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, individually and officially as warden of Burlington County Jail; ESSEX COUNTY CORRECTIONAL FACILITY; ESSEX COUNTY SHERIFF'S DEPARTMENT; STATE TROOPER JOHN DOE individually and in his capacity as a State Trooper and JOHN DOES 1-3 of BURLINGTON COUNTY JAIL and ESSEX COUNTY CORRECTIONAL FACILITY who performed the strip searches and JOHN DOES 4-5,

Defendants.

THURSDAY, NOVEMBER 30, 2006

Oral sworn deposition of JERRY COLEMAN taken at the law offices of Parker McCay, PA, 7001 Lincoln Drive West, Marlton, New Jersey, on the above date, commencing at 1:30 p.m., there being present:

Appendix M

* * *

[10:7]

Q. Now, as a corrections officer since – did you say the –

A. 1990 I started.

Q. And then you were supervisor of the booking are?

A. Yes.

Q. And now you're sergeant?

A. Chief of ID.

Q. Then you are more than qualified to explain the intake processing procedure for a hold over?

A. Yes.

Q. So then once these two documents establish to your intake people that he is a hold over, what happened with Albert Florence next?

A. Once the paperwork's accepted and the supervisor also has to be present in order to accept the inmate, so we would insure that he's medically fit for incarceration which we would contact the nurse. The nurse would come by and do a [11] prescreening. Once the nurse

says okay, he's fit to be in our facility, then we will start the process of changing him over into our custody.

* * *

[11:4]

Q. And what's that process of changing him over include?

A. Searching his clothes, putting him in the shower for Kwell and giving him an inmate jumper.

Q. How do you put him in the shower for Kwell?

A. The officer would take him behind the shower. Basically it's a secluded point of the facility because there's a shower curtain where nobody else could see. Since he's contempt so he's a municipal, they would do visual observation on him, give him Kwell and he will use the Kwell and tell him how to use the Kwell. And then after he showers, he comes out and he changes over into an inmate jumper.

Q. What does a visual observation include?

A. The officer is checking for any deformities, bruises, marks, tattoos, puncture wounds.

Q. How does the officer check for that?

A. The inmate would basically take off his pants, his shirt and the officer would look him up and down.

[12]

Q. Front and back?

A. Front and back.

Q. So would the inmate be stripped naked when that happens?

A. Yes.

Q. Would the officer direct him to strip naked?

A. Tell him to take all his clothes off.

Q. Including socks and shoes?

A. Yes.

Q. And the officer would direct him to turn around?

A. Yes.

Q. And as part of that process, would they be directed to lift their genitals?

A. No, not if he's just doing a visual observation, which for him in municipal it would be a visual observation.

Q. All municipals get a visual observation?

A. Yes.

Q. And do you train officers that way or are they trained by somebody else?

A. They're actually trained down at the academy.

* * *

[22:10]

Q. Moving on, so what is the procedure once a hold over is brought to the shower area?

A. Once he's brought to the shower area, there's visual observation or search –

Q. Let me take it step by step. Is he directed to remove all his clothing?

A. Yes.

Q. Does the visual observation occur when he's directed to remove all his clothing?

A. Yes.

Q. Does it only occur when he's directed to remove all his clothing or can it occur at other times?

A. No, only at that time.

Q. Only at that time?

A. Yes. [23]

Q. Can it occur while he's in the shower?

A. He's in the shower at the time –

Q. At the time that he's directed to –

A. Yes.

Q. I interrupted. I'll clear the record. Does the shower have a curtain or does the room have a curtain?

A. It's a shower that has a curtain and then we just have a bench in the room and then you have another opening for the shower.

Q. It's a shower room with a bench in it, is that correct?

A. Correct.

Q. And to get into that shower room there's a curtain, not a door?

A. Correct.

Q. And does both the officer and the – in this case hold over person or any detainee, does the officer and the detainee enter the shower room together?

A. Yes.

Q. When a person takes a shower in that shower room, the officer is sitting on the bench?

A. No.

Q. Where is the officer? [24]

A. Once he gives him the Kwell and instructs him how to use the Kwell, the officer leaves and the inmate takes the shower.

Q. How does the officer instruct the person to use the Kwell?

A. Put the Kwell on, keep it on for ten minutes. Make sure you wash it off real good with warm soapy warm. Let him go take his shower. Take his clothes and then go back to the counter and start processing.

Q. Does the officer tell the person where to apply it or how to apply it?

A. Yes.

Q. Is all this done while the person is naked?

A. Yes.

Q. The instructions are given while the person is naked?

A. Yes.

Q. That's also when the visual observation is made both front and back of the person?

A. Yes.

Q. Your duties right now are only with respect to intake of persons?

A. Intake and discharge.

* * *

[30:15]

Q. And every municipal person entering your facility is subjected to a visual observation by what you described?

A. Yes.

Q. Is there a difference between a strip search and a visual observation to you?

A. Little difference, yes.

Appendix M

Q. What would the difference be?

A. The strip search we have the person bend down, squat and lift their genitals. We also have them lift up the bottom of their feet and lift both [31] of their arms.

* * *

APPENDIX N — ORAL SWORN DEPOSITION OF HAYWOOD REEDER, DATED NOVEMBER 30, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH RODRIGUEZ

CIVIL ACTION NO. 05CV3619 (JHR)

ALBERT FLORENCE,

Plaintiff,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON; BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, individually and officially as warden of Burlington County Jail; ESSEX COUNTY CORRECTIONAL FACILITY; ESSEX COUNTY SHERIFF'S DEPARTMENT; STATE TROOPER JOHN DOE individually and in his capacity as a State Trooper and JOHN DOES 1-3 of BURLINGTON COUNTY JAIL and ESSEX COUNTY CORRECTIONAL FACILITY who performed the strip searches and JOHN DOES 4-5,

Defendants.

THURSDAY, NOVEMBER 30, 2006

Oral sworn deposition of HAYWOOD REEDER taken at the law offices of Parker McCay, PA, 7001 Lincoln

Appendix N

Drive West, Marlton, New Jersey, on the above date, commencing at 12:15 p.m., there being present:

ALAN L. LESKY & ASSOCIATES
THE LEXINGTON BUILDING
180 TUCKERTON ROAD
MEDFORD, NEW JERSEY 08055
(856) 983-3282

[3] WITNESS PAGE

HAYWOOD REEDER

Examination by Ms. Lask

[4]

HAYWOOD REEDER, having been duly sworn, was examined and testified as follows:

BY MS. LASK:

Q. Hi, Mr. Reeder. My name is Susan Chana Lask. I'm the attorney for the plaintiff. This is a complaint regarding strip search issues over at Burlington. Have you reviewed the complaint?

A. No.

Q. Have you prepared for this deposition before you came in any way?

A. No.

Q. Okay. I'm going to ask you questions. You wait till I'm finished. You'll answer. I'll wait till you finish your answer. We'll work like that. I won't interrupt you, you won't interrupt me unless you don't understand. Of course I'll repeat or rephrase for you. I'm not here to trick you or anything like that. I really just want to know exactly the procedures and get some answers. There's a lot of things hat I don't even understand myself so it's not that I'm making believe. I really don't know. I'm going to ask for your full name.

A. Haywood Reeder.

Q. Your date of birth?

[5]

A. [REDACTED]

Q. And when did you start working for the Burlington County Prison?

A. 1990.

Q. And what was your position in 1990?

A. Correction officer.

Q. And how long were you a correction officer, till what year?

A. I'm actually still a correction officer.

Q. And are you now also an instructor? I see on your shirt it says instructor by your badge.

A. Yes.

Q. You're an instructor of what?

A. Several things. Policy and procedures, rules and regulations.

Q. All policies and procedures or any particular policies and procedures or rules and regulations?

A. All.

Q. And who do you instruct?

A. I instruct civilians for civilian orientation and also new hires, officers.

Q. New hires for the prison system?

A. Yes.

Q. At Burlington only?

[6]

A. Yes.

Q. And do you do the civilian training as part of the prison system community service or something?

A. No. We have civilian employees.

Q. Okay. Would the civilian employees be the computer room people, the people that do computers? Who would they be?

A. Civilians would be social services, medical staff, secretaries.

Q. Are the people that work on the computers, are they officers always?

A. Which computers are you referring to?

Q. Like the people that -- the intake people, the ID personnel, are they always officers?

A. ID personnel are always officers, yes.

Q. So do you provide training in the last -- I'm sorry, since 1990 were you an instructor?

A. No.

Q. When did you become an instructor?

A. 1997.

Q. And how do you become an instructor? What qualifies you to become an instructor?

A. Well, you're actually picked like any other thing. Somebody in the higher rank, maybe the warden, recognizes I imagine good work and they [7] continue to take you to school and bring you to different schooling and you qualify through MOI and different things like that.

Q. When you were a corrections officer before an instructor, did you ever work in intake?

A. No.

Q. Did you ever work in booking?

A. No.

Q. What was your position?

A. I was basically the SA, which is a special assignment officer who goes around to different parts of the jail picking up people and dropping them off to different appointments, whether it be visiting, releases. Also I worked in the detention area.

Q. So the different people you were picking up, were they civilians?

A. Inmates.

Q. The inmates. Did you ever perform strip searches on any of those inmates?

A. Yes.

Appendix N

Q. About how many have you performed during your career as a corrections officer before you were an instructor?

A. A hundred.

[8]

Q. Okay. Only men?

A. Yes.

Q. And what was your procedure to strip search people, those hundred people then?

A. The procedure as far as.

Q. Strip searching. What was -- let me make it easier. What was your basis of strip searching a person when you were a corrections officer?

A. The basis of a strip search is to find contraband.

Q. And on who?

A. Inmates.

Q. And when do you usually implement that procedure?

A. There's different times it's implemented such as when they're in disciplinary detention which is segregation. If the inmate violated a policy and procedure, sometimes

they're taken to a different part of the facility which is detention. Detention inmates, whenever they leave their cell out of the area and come back, they're strip searched.

Q. How many of those hundred did you perform during an intake, any?

A. Probably none.

Q. Do you have training videos with respect to [9] strip searching in the last ten years or during your period of time as an instructor that you use at Burlington County for the civilians and/or officers?

A. I don't have any strip search videos. It would be hard to get a strip search video.

Q. A naked dummy? Are there booklets or manuals that you use in your instruction?

A. Yes.

Q. And are they prepared by you, those booklets or manuals?

A. No.

Q. What are the names of those booklets or manuals?

A. You have videos that touch on strip search but it doesn't actually show a strip search, VHS tapes. The actual name I'm not sure. It doesn't go through a strip search.

Q. What does it basically show?

A. Pat searches.

Q. Particularly with the strip search, what's it have, a couple of minutes referring to when and where it should be done or how? You tell me.

A. I don't know right offhand.

Q. What are the name of those VHS tapes?

A. Intake Process.

[10]

Q. There's just one?

A. That I can recall, yes, that we use. There may be more out there that I don't know about.

Q. Right, just the ones that you use. A VHS tape called Intake Process that touches a strip searching?

A. Correct.

Q. Who trained you with respect to strip search procedures?

A. My initial training when I was hired was done by Sergeant Brillsford.

Q. Back in the 1990's?

A. Correct.

Q. What was the extent of your training? What did that include?

A. How to strip search, when to strip search.

Q. And after that initial -- that's your initial training by Sergeant Brillsford?

A. Brillsford.

Q. After that did you receive additional training regarding strip searching?

A. At the academy.

Q. And going back to Sergeant Brillsford, how long was that training?

A. It was a two-week agency training class.

[11]

Q. Only about strip searching?

A. No.

Q. Other topics were covered?

A. Yes.

Q. Would it have been one day or half a day on strip searching?

A. A whole day was not spent on strip searching.

Q. So maybe half a day?

A. Probably less than half a day.

Q. Okay. And then the very next time you were trained on strip searching was during your academy?

A. Yes.

Q. And when was that academy attendance?

A. I attended the academy in 1992.

Q. And how long was academy attended, 1992 through?

A. It was the end of 1992, the beginning of 1993. It was a ten-week course.

Q. So what's the purpose of the academy course? You're already an officer, is that correct?

A. Correct.

Q. And then you go to the academy for what reason?

A. Further training.

[12]

Q. On guns?

A. Fire arms, defensive tactics, CPR, 2C.

Q. Included in that ten-week course or training, how much time was spent on strip search?

A. I can't recall.

Q. Would it be a day or would it be the same as the Sergeant Brillsford training?

A. I can't recall.

Q. And who trained you regarding strip searching during the academy?

A. Camden County correction staff. Academy staff.

Q. What year was that?

A. 1992.

Q. Then after the academy were you trained again regarding strip searching by anyone or any agency?

A. On-the-job training, informally.

Appendix N

Q. And when you conducted your strip searches, was there a supervisor always there to supervise your strip search or do you strip search one -- individually on your own?

A. There was a supervisor in the area.

Q. In the area, okay. When strip searches are conducted, are they only conducted one on one, one [13] officer to one prisoner?

A. Whatever it deems necessary for how much security is needed for that individual.

Q. If it's a one-on-one situation, there's never any need to have two officers present, meaning if it's a non-indictable offense, would you strip search?

A. Non-indictable, I would not strip search. During the intake process?

Q. Yes.

A. No.

Q. Right. If a prisoner came in as a hold over on a -- do you know what a civil contempt charge is?

A. No.

Q. Is that an indictable offense that you know of?

A. Civil contempt, no.

Q. No, you do not know or no, it's not?

A. No, it's not indictable.

Q. If a person came in on a civil contempt charge as a hold over in Burlington County, how would you train your officers to search or not search that person? What would your strip search training be towards a person under those [14] circumstances?

A. He wouldn't be strip searched.

Q. What is your definition of a strip search?

A. Searching for contraband from an inmate with an unclothed search looking in different areas, different parts of his body to look for contraband.

Q. Naked?

A. Yes.

Q. The person is completely naked?

A. During a strip search, yes.

Q. Your training to the officers at Burlington County, does it include if you're going to strip search somebody they have to be completely naked?

Appendix N

A. If I'm going to strip search someone, are they completely naked?

Q. Yes.

A. Yes.

Q. What is your training with respect to visual observations?

A. Visual observation is checking for scars or marks.

Q. Completely naked?

A. For visual observation? Depends on the circumstances.

Q. Okay. What are the different circumstances [15] for visual observation?

A. If you're doing a visual observation and the inmate is getting changed over and you're not showering or anything like that in another part of the facility, I'm always observing everything around me so I'm doing a visual observation. If we're doing a visual observation as far as you mean when the inmate is showering?

Q. Yes.

A. He could be naked.

Q. If someone's changing over, you mean to the orange jump suit?

A. Correct.

Q. So when the person is changing, they're taking off their civilian clothes and going into the orange jump suit, is that correct?

A. If that's what you're referring to, that part changing. He could be changing from a green to an orange jumper too.

Q. Any prison issue, a change over.

A. Coming from a civilian or already being housed in the facility.

Q. Intake coming as a civilian he's now taken to -- you tell me. What is the process when a person comes into the your facility at intake? Am I [16] correct that ID personnel makes sure that the proper paperwork is present?

A. Yes.

Q. Would the next step be that they fingerprint and photograph the person?

A. Yes.

Q. And at some point after that would they be taken to the shower room?

A. Yes.

Q. Right from there at the shower room, what is the process that you teach and understand at Burlington County?

A. We also give them something called Kwell which is like a de-licer. We have the inmate go into the shower area, use the Kwell. He actually has to get undressed first. Use the Kwell and shower.

Q. When he gets undressed, where does he get undressed?

A. In the shower area behind the curtain.

Q. Behind the curtain?

A. Yes.

Q. When is he given the Kwell?

A. He's actually given the Kwell. It depends. I can hand it to him in the shower area or outside [17] of the shower area.

Q. And when do you make the visual observation for any scars, marks or anything else?

A. I'm observing the whole time.

Q. Even when they're taking the shower?

A. Yes.

Q. So --

A. Not the whole time while he's taking the shower. While he's getting undressed to take a shower, yes, I'm observing.

Q. When he takes off all of his clothes, you see him naked and look for scars, tattoos?

A. Yes.

Q. Notwithstanding if it was indictable or not indictable, no matter what it is, when that person goes to the Kwell room, you're observing them naked for scars or tattoos?

A. Yes. I'm also making sure he's using the Kwell.

Q. So you make sure that they apply it on their body naked?

A. Yes.

Q. Even in a non-indictable?

A. Yes.

Q. And do you instruct them how to apply the [18] Kwell or do you just observe and make sure that they get their head and their hair?

A. If there's an inmate who knows how to do it, an inmate who's been there lots of times --

Q. I'm only referring -- I don't mean to interrupt. Let's just stick with a prisoner that was just brought in after intake for the first time.

A. Yes, I would instruct them how to use it.

Q. I think I did see in your rules and procedures that they could know how to do it so they don't need instruction, is that correct, do you recall something like that?

A. I don't recall.

Q. But a new person would be instructed how to apply it while they're standing there naked?

A. Yes.

Q. And is this also an opportunity for you to check for scars and marks?

A. Yes.

Q. That's how you instruct every officer to conduct the Kwell process or the shower process?

A. Yes.

Q. Does every officer follow your procedure?

A. I don't know.

Q. But they should?

[19]

A. Yes.

Q. So that's called a visual observation, Is that correct?

A. Correct.

Q. What is a strip search?

A. A strip search is also checking for contraband, scars, marks and tattoos.

Q. While they're naked?

A. While they're naked.

Q. And then what is your definition or understanding of a body cavity search?

A. A body cavity search is when the body -- the inmate could actually pull something out of. If we notice something, if he wants to willingly pull it out. If not, a medical staff could have it taken out.

Q. On a body cavity search would it be to find as an observation of the person's anal area or manipulating genitals, is that included in a body cavity search or is that part of a body cavity search?

A. I don't understand the question.

Q. Would a body cavity search mean to you the visual inspection or manual search of a person's anal or vaginal cavity?

[20]

A. Yes.

Q. So it's a visual inspection or you can manually, you can either visually inspect or manually, meaning touch the person?

A. No.

Q. What does manual mean?

A. Manually touching?

Q. What does a manual search of a person's anal cavity mean?

A. Body cavity search.

Q. How is that conducted?

A. That's conducted by a physician.

Q. What does visual inspection of an anal cavity mean, just looking?

A. Yes. Of the anal cavity?

Q. Yes.

A. During a strip search is where you're actually searching for things. The anal area, I mean during a strip search I'm saying I'm searching for something. A visual observation, I'm looking for something. I'm just looking at the body just observing. When I ask you to strip search, that means I have you open your mouth, I have you cough, I have you lift up the bottom of your feet. Now I'm searching for something.

[21]

Q. What is the difference between a visual observation and visual inspection of a person's naked body?

A. Difference between a visual observation and a visual inspection of a naked body?

Q. Right.

A. I don't see a difference.

Q. Okay. Do you know of any complaints of the inmates or any persons in custody at the Burlington County Jail with respect to strip search? Are you familiar with any complaints or do you have any knowledge of inmates complaining that they were unlawfully strip searched?

A. No.

Q. Are you aware of any grievances or complaints against any officers that you trained with respect to strip searches or unlawful strip searches over at Burlington?

A. No.

Q. Is the Kwell always liquid or is it a bar of soap waiting for them in the shower stall or could it be either?

A. As far as I know, it's a liquid.

Q. Do you instruct all of your officers to insure that the person -- direct the person to apply [22] the Kwell on while they're naked?

A. Yes.

Q. Are you involved in assisting Warden Cole in making the policies and procedures that you're the instructor of? Do you sit in with him in meetings and discuss finalizing certain policies and procedures?

A. No.

Q. You don't? Never?

A. I have been asked questions about my opinions on things but as far as sitting in on meetings.

Q. This is a strip search authorization form signed by Sergeant Chilton, March 3rd of 2005. It's time stamped. Does that look like it was properly filled out to you?

A. There's no date and time.

Q. It's stamped. But does that stamp justify a properly filled out form or must it be handwritten and signed by the sergeant? Is that an improperly filled out form?

A. I would say there should be a date and time written in there.

Q. Right. Should there be anything else attached to the strip search form or included with [23] it?

A. The rest of the intake paperwork.

Q. On that form at the bottom does it say that a visual observation was made during the Kwell process, am I interpreting that correctly?

A. Yes.

Q. And that visual observation, again we've established that means while the person was naked they were visually observed?

A. Correct.

Q. Should there be a second page to that form that you know of, meaning a picture of the person's body showing tattoos?

A. The visual observation form?

Q. Yes. I'm trying to find it. Should that always be attached to that?

A. Yes.

Q. If it's not, does that call for any kind of discipline or improper filing of papers? This is the body search sheet I'll show you. Should that have been attached to it?

A. I would say yes.

Q. Why should it be attached? What's the purpose of that body search sheet?

A. For scars, marks, tattoos.

[24]

Q. If you're making a visual observation of someone standing there naked, the purpose is to fill out that body search sheet so your facility's on alert of any scars, tattoos or identifying marks, correct?

A. Correct.

Q. If it's not filled out, then you have a visual observation that has no real meaning, would that be correct?

A. I would say no.

Q. Why?

A. If it's not filled out?

Appendix N

Q. If the second page, the body search sheet isn't attached, then what is the purpose of the visual observation for the facility?

A. This is actually saying you conducted a body search.

Q. This second page?

A. Yes. That's a body search sheet. It means the body was searched, not visually observed. This paper here is saying the body was visually observed.

Q. Okay. So then are you saying this does not need to be attached to this? At the bottom on the body search sheet it lists was Kwell applied, yes or no. Should that have been attached to this strip [25] search authorization form?

A. Not if he wasn't -- not if he wasn't searched, had a body search. This is a visual observation. The body search, according to this he didn't do a body search.

Q. What is the purpose of the visual observation? You said to note any scars, tattoos, identifying marks?

A. Correct.

Q. This body search sheet says exactly note any scars, tattoos, cuts, bruises, bandages or casts. Also note any physical abnormalities.

A. Correct.

Q. Should this have been part of that sheet?

A. During the visual observation if no scars, marks or tattoos were found.

Q. How do we know this if Sergeant Chilton didn't fill out the second page?

A. He didn't fill it out because it wasn't -- I would say it he didn't fill it out because it wasn't.

Q. Well, you're assuming?

A. Yes.

Q. Your officers that you instruct, do you instruct them to always have page two attached to [26] the strip search authorization?

A. No.

Q. You don't instruct them?

A. No.

Q. So it's not necessary you're saying? Well, it asks was the resident showered with Kwell or equivalent. So that's not necessary on this body search sheet?

A. If he didn't do a body search?

Q. Right.

A. No.

Q. Can you explain the difference between a visual observation and a strip search?

A. Yes.

Q. What would that be?

A. Visual observation is while the inmate is undressing or showering you're doing a visual observation, just looking at his body.

Q. Naked?

A. Yes.

Q. What's the strip search?

A. A strip search is during the same process. In other areas, other times in the facility you have to do a strip search you're actually searching on the body for scars, marks, tattoos and contraband.

[27]

Q. And is it your instruction that you can do a visual observation on all inmates received initially at the facility whether they're indictable offenses or not indictable, is that correct?

A. Yes. All inmates have to be showered.

Appendix N

Q. And visually observed naked?

A. And Kwelled, yes.

Q. How many officers do you train at Burlington County, how many officers are under your instruction?

A. Have I ever trained?

Q. Yes. About how many.

A. Hundreds.

Q. And about how many officers are there presently under your instruction?

A. Hundreds.

Q. For this year?

A. 43 I believe.

Q. And last year would it be about the same number?

A. Approximately.

Q. All of them are trained the same way with respect to strip searches and visual observation?

A. Yes.

Appendix N

Q. Would it be correct to say that all 43 of [28] them at any time can conduct a strip search or visual observation, they all have the authority to do that when necessary, is that correct?

A. A strip search?

Q. Yes.

A. With given authorization?

Q. A strip search.

A. A strip search has to be authorized by a supervisor.

Q. Always authorized by a supervisor?

A. Yes.

Q. This strip search form that I showed you, Sergeant Chilton would have been the supervisor that has to sign off on these?

A. If he was sergeant in ID at the time, yes.

Q. Whenever somebody is strip searched, there's always a form that's filled out before they're strip searched, it has to be authorized first, is that correct?

A. A written authorization?

Appendix N

Q. Just by this strip search authorization form, what is the purpose of the strip search authorization form? Why does it exist?

A. To explain or tell why the inmate was strip searched.

[29]

Q. Is this always authorized before they're strip searched?

MS. SAVAGE: Are you referring to at intake because he's already testified that they do strip searches at different points of time.

Q. At intake.

A. Yes.

Q. So before the strip search it's authorized first, and then is it correct that a corrections officer does the strip search without the sergeant there, it's one on one at intake?

A. Directing behind the curtain or in the area. There's a supervisor in the area.

Q. In the area, right.

A. Yes.

Appendix N

Q. Does a strip search include directing the person to lift their genitals? Is that part of a strip search?

A. Yes.

Q. Does a strip search include directing the naked person to turn around?

A. Yes.

Q. Are there any memos that you receive from the warden regarding strip search or is it just the policies and procedures booklets that you have and [30] the updates?

A. Policies and procedures updates.

Q. Never memos coming down from the warden or anybody else regarding strip search procedure?

A. I don't recall any policies, memos coming down.

Q. Additional memos to the policies and procedures.

A. Correct.

Q. How many times a year do you train the corrections officers with respect to strip search procedure?

A. As many as they hire for the year.

Q. But I mean do you train them once a year, do you train them every three years? How much training does an officer get with respect to how to conduct a strip search?

A. Are you referring to an annual refresher maybe?

Q. Yes.

A. The initial training. We don't do annual updates on strip searches.

Q. Right. So it would just be their -- maybe their agency class, the two-week class, it happens there that you talked about earlier or the academy? [31] They definitely get their strip search information from the academy? Is that how it starts?

A. It starts at agency training.

Q. Agency training. Does everybody go through the academy?

A. Yes.

Q. And then at the academy they learn something about strip searching too?

A. Yes.

Q. Could you tell me what your understanding of the Fourth Amendment is with respect to unreasonable searches and strip searches, how that applies?

A. I don't know.

Q. Okay. Have you ever heard of a case called Davis versus City of Camden, are you familiar with that?

A. Not at all.

Q. You said you instruct everybody on all policies and procedures with respect to Burlington County Jail, is that correct?

A. Yes.

Q. What would be your instruction with respect to a hold over being processed at your jail, brought in, what is the first thing that the ID personnel [32] are supposed to do?

A. Check the paperwork.

Q. What paperwork would that be?

A. The paperwork that came with the inmate, the charges.

Q. And do you know what paperwork usually it would be or it could be different paperwork each time on a hold over?

A. Yes.

Q. I'm going to show you this hold over, Burlington County, New Jersey. It looks like a card. It's a copy. It was something your counsel provided us. Is that a card that's filled out by the officer bringing in the hold over?

A. I don't know.

Q. Have you seen that form before?

A. Not that I can recall.

Q. When you provide your instruction to your personnel, do you tell them to look for that form?

A. No.

Q. What do they look for on a hold over?

A. The different paperwork.

Q. That does have the Burlington County name on it but that doesn't look familiar to you at all?

A. No.

[33]

Q. From your looking at it, does it look like a proper hold over document that would give Burlington County authorization to keep a hold over?

A. I'm not familiar with all the hold over paperwork. The ID officers pretty much would know more about that than me.

Q. Who trains them with respect to that?

A. The supervisor on the particular shift.

Q. So this has nothing to do with your training then?

A. No.

Q. So then you don't train on all of the policies and procedures in Burlington County. It's a large policy and procedure booklet.

A. I don't have a policy on hold overs and this particular paperwork.

Q. You don't have a policy?

A. That I can recall.

Q. What would your training include with respect to a hold over that's brought in and says no, you have the wrong person, this warrant is not valid? What would you instruct your ID personnel to do in that case?

A. I would instruct him to see the ID supervisor.

[34]

Q. See the ID supervisor. What is the ID supervisor supposed to do in that kind of case?

A. Check the paperwork and make the proper calls, whoever he or she had to make the calls to to find out if it's truth in the matter.

Q. Would checking the NCIC or the CJIS be sufficient enough to check to see if a warrant actually existed or would there be anything further that can be done?

A. I'm not sure if there's more protocol to it or not.

Q. What would you do in that situation? What would you check?

A. I'm not the ID supervisor.

Q. So an ID supervisor would be the proper person. So when we talk about policies and procedures that you train on, do you know the numbers of the policies and procedures? Are you familiar with section 1277?

A. Not off the top of my head, no.

Q. Do you train your personnel with respect to uniform and laundry bag distribution, that type of thing?

A. We touch on just about every policy. You also have to understand we also have after 40 hours [35] to 80 hours of agency training there's also 80 more hours of on-the-job training where they're put in different areas where they would be with the ID supervisor. Maybe the supply officer who's in charge of laundry.

Q. I understand. Am I correct that every person that comes in initially to your facility, are they supposed to under your policies and procedures get two collect calls immediately, does that sound right?

A. No.

Q. No? Okay. When are they allowed to make a phone call once they're brought into your facility?

A. After they're finished the processing.

Q. So would it be immediately after processing that -- when is processing finished, after the shower procedure?

A. No, it's not totally finished then. There's actually a process you have to see the medical staff.

Q. When does that happen?

A. It's all around the same time.

Q. Should it occur in one day?

A. Yes. There's two different parts of the medical screening. You actually get to see the [36] nurse when you first come in. And then there's another medical screening where you're actually cleared to go in population.

Q. Okay. Well, at intake are the inmates separated according to their charges?

A. Yes, for the most part.

Q. How is that done?

A. In different tanks.

Q. What are the different tanks labeled?

A. They don't actually have labels on it. It could be an inmate with the same -- two inmates that come with the same charges, and if we have the assess ability to keep them separated, we will.

Q. Would they be separated according to their charges, meaning indictable charges and non-indictable charges at intake?

A. That would be up to the supervisor of ID.

Q. It's not necessarily a rule or regulation at Burlington?

A. Not that I'm aware of.

Q. What is the policy if a corrections officer strip searches a person in your custody that shouldn't be strip searched, unlawfully strip searched, what happens then?

A. I have not been aware of that happening.

[37]

Q. If you received an order from the court telling you that your visual observations are actually strip searches and must be stopped, would you follow that order?

A. Me personally?

Q. Yes, you personally.

A. Yes.

Q. And you would instruct your officers to stop visual observations because of that court order?

A. Yes.

Q. Do you have any knowledge of this particular visual observation with Albert Florence? Have you reviewed the file?

A. I haven't reviewed the file.

Q. Did you just come here today to talk about your knowledge of instruction of strip searches?

A. Yes.

Q. Are you familiar with the computer system at Burlington County?

A. No.

Q. Do you input any information yourself in the computer systems?

A. No.

Q. Are all the strip searches done by the [38] manual handwritten form? Are they completed that way? Okay, I'll rephrase that. Is the manual strip search form that we

were talking about earlier with the body search sheet, the two pages I was showing you, is that the only evidence of a strip search, visual observation and the Kwell application for each inmate, is it always that form?

A. Yes.

Q. And is anything input into the computer with respect to a strip search or a visual observation or Kwell application?

A. I'm not sure about the computer.

Q. So does every file of every inmate contain that strip search form, should it contain?

A. Should contain.

Q. And every inmate has a physical file, is that correct, like a folder?

A. Yes.

Q. And there's certain intake information in there, other information on paper?

A. Yes.

Q. And is that kept at the prison, their folders, their files?

A. The present inmates?

Q. Yes. The present inmates.

[39]

A. Yes.

Q. And what about the past inmates?

A. I'm not sure what they do to it after a certain amount of years.

Q. About how many cells are there at the prison in total?

A. A hundred and 50 maybe.

Q. And does each one hold up to two prisoners?

A. Yes.

Q. Are they always full, is every cell full?

A. Excuse me. All cells don't hold up to two prisoners.

Q. Really. Some cells hold two, some cells hold one?

A. There are single bunk cells.

Q. Is the majority of the cells two people?

A. Yes.

Q. Would there be more than a hundred cells that are two people and maybe 40 that are not, something like that?

A. I'm not sure of the number.

Q. Are there cells for initial intake people and then there's cells for the general population, is that how it works?

A. Yes.

[40]

Q. And do you know about how many cells there are for initial intake people?

A. Approximately 17.

Q. And then the rest are the general population cells?

A. Not general population but we do have different areas in the facility that's not for intake and not for general population also so, no.

Q. But the initial intake are about 17 cells. How long does a person stay in the initial intake cells?

A. Until he's cleared by classification, the medical staff.

Q. Is the last step medical clearance to get into the general population cells?

A. That step is classification.

Q. What's classification mean?

A. Classification is when there's a board of -- consisting most of the time the deputy warden, ID booking personnel, a nurse and they're at a table. They bring the inmate in and speak to him about any problems that he may have or maybe as a co-defendant to see if he's maybe -- to further investigate if he's gang-related or different things like that. It's done on a point system.

[41]

Q. Every initial intake person goes through that board? Is that a board you would call it?

A. Yes.

Q. If the initial intake person went to that board and stood there and sat there and said this warrant is not valid, I shouldn't be in this prison, what does that board do, put them in the general population anyhow?

A. I don't know.

Q. Is there a procedure or policy on that like I would -- I'm presuming a grievance is, you know, I'm put into the prison and I go before that board and my grievance is don't put me in the general population, I shouldn't even be here, you've got the wrong person, what would the procedure be or policy be?

A. It would have to go through the grievance channels.

Q. Is that what it is, it's a grievance, I just made a grievance?

A. The grievance is actually in writing.

Q. It has to be in writing?

A. In writing.

Q. Does a person at intake have the chance to make a grievance like that in writing?

[42]

A. I'm sure he does.

Q. You're sure or --

A. I haven't been aware of an inmate making a grievance during the intake process.

Q. I'm just thinking about how everybody probably comes in there and says I didn't do it.

A. That's not a grievance.

Q. A grievance -- then what would be a grievance?

A. In writing something that you're disputing.

Q. Like disputing that you're the wrong person arrested or that this is a misidentification?

A. Could be grounds for a grievance, yes.

Q. Would you arresting me on a warrant that doesn't exist be a grievance?

A. We don't do the arresting.

Q. Not you. I'm here on a warrant that doesn't exist. Please get me out. Don't put me -- if I said don't put me in the general population, there's no warrant against me, you have the wrong person, would that be a grievance?

A. I would say it depends on the paperwork.

Q. Would that have to be put in writing, that grievance? Is that your procedure?

A. To go to the grievance channels, would that [43] be put in writing?

Q. Yes.

A. Yes.

Q. Once you put it in writing, how long does it take to get reviewed?

A. I don't know.

Q. What's the channel for grievance?

A. Usually goes through a supervisor. If the supervisor can't handle it, it goes to his supervisor and up the chain of command.

Q. The last chain of command, would that be the warden?

A. I would say yes.

Q. Are you familiar with warrants to satisfy judgments, those kind of documents?

A. No.

MS. LASK: Okay. I don't have any further questions.

MS. SAVAGE: I don't have any questions.

(Deposition concluded.)

[44]

APPENDIX O — EXCERPTS OF ORAL DEPOSITION OF CHARLES PALMER, DATED DECEMBER 7, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 05 CV 3619 (JHR)

Albert Florence,

Plaintiff,

vs.

Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and officially as warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; State Trooper John Doe, individually and in his capacity as a State Trooper and John Does 1-3 of Burlington County Jail and Essex County Correctional Facility who performed the strip searches and John Does 4-5,

Defendants.

* * *

Thursday, December 7, 2006

* * *

[4-13]

A. I haven't been a sergeant or lieutenant or anything. I done outside work. That's it.

Q. In security?

A. No. I was like working in a mall and everything.

Q. So as a corrections officer at Burlington County were part of your duties from 2000 to the present working at the intake processing unit?

A. No. I started working on like the tiers.

Q. The floors?

A. The floor and everything. Then 2003 I got into intake. I bid for a spot. I got an intake spot.

Q. So in 2003, about when?

A. About August of 2003 I started booking, booking area.

Q. This particular case has to do with an intake of March 3rd of 2005 regarding an Albert Florence. Does that name sound familiar to you?

A. No, it doesn't.

Q. Would you recall the intake of Albert Florence on March 3rd of 2005 at all?

A. No.

Q. Since you've been working in the intake unit about how many commits have you seen go in [5] those doors? Would it be thousands?

A. Yes.

Q. Would it be like tens of thousands?

A. The numbers could possibly reach that high. I mean because on average you figure, I don't know, we go through a lot a day sometimes. Some days we don't get any.

Q. How many on an average weekly would you say commits come through those doors?

A. Just on 3 to 11 or other shifts also?

Q. Do you work other shifts other than 3 to 11?

A. Sometimes I work 11 to 7. Sometimes I work 7 to 3. Just on overtime.

Q. Weekly, all shifts?

A. We can get up to 30 a day.

Q. How many of those would you say daily would be non-indictable commits?

A. Maybe half, maybe a little more.

Q. Daily?

A. Daily.

Q. Of those non-indictables could you tell me what your definition of non-indictable is?

A. Non-indictable is like a municipal charge, maybe like traffic or contempt of court.

[6]

Q. Coming in for a traffic or contempt of court charge would that commit be subjected to a strip search?

A. No.

Q. Would that commit be subjected to a visual observation?

A. Yes.

Q. Tell me your procedure for a visual observation?

A. Visual observation is just we after getting the paperwork and everything we take the subject into the shower area. Ask them to remove their clothes. Just basically like turn around and observe and see if we see any distinguished marks or bruises. We jot down if we see anything wrong with them or anything. You know, have them take a shower, Kwell them and have them take a shower. That's it.

Q. When they remove their clothes do they remove them in front of you when you conduct that procedure?

A. Yes.

Q. At all times are you standing in the room with the commit when they are removing their clothes?

[7]

A. While they are removing their clothes, yes.

Q. Why do you stand in the room while they remove their clothes?

A. Just in case they have anything else on them or anything we actually go through the clothes and make sure nothing else is on them. Make sure nothing gets into the jail.

Q. Would it be proper procedure if you left the room and left the commit in that shower room alone?

A. No. That's not proper procedure to leave them alone. After we do our visual check and everything we do leave them shower by themselves but other than that.

Q. So would it be fair to say it would be improper procedure for any officer to leave the commit alone once they take off their clothes and before they enter the shower?

A. Correct.

Appendix O

Q. And the shower is not a shower curtain, am I correct? Is it like cinderblock? Or can you describe –

A. At that time it was a cinderblock wall actually. It was an area where we had a bench [8] and a sink and there was an area right where the inmate stood. Then you go behind a wall and the shower is behind a wall.

Q. When they're behind that wall, the inmate, can you see any part of their body, like their head and shoulders?

A. No.

Q. Before they enter that shower are they completely naked?

A. Yes.

Q. Before they enter that shower completely naked has the visual observation been conducted already?

A. Yes.

Q. When the visual observation is conducted before they enter that shower have there been times when you sat or stayed – forgetting sat, just stayed in that room waiting for them to come out of the shower?

A. No.

Q. Do you always leave the room when they go in the shower?

Appendix O

A. When they go – after they go into the shower we leave.

Q. Where do you go?

[9]

A. We come back out into the booking area and finish up our paperwork and put their property away and everything.

Q. How do you know they finished their shower?

A. Sometimes you don't know if they have finished. You don't really know if they finished their shower or if they even took a shower. After that we close the curtain and everything after we're done our observations and we don't stay in there until they're finished or everything. We give them what they're supposed to do and leave out.

Q. When you visually observe them standing before you do you have them turn around?

A. Yes.

Q. Are there times that you visually observe them without their undergarment on?

A. Repeat that.

Q. Are there times when you visually observe them completely naked?

A. Yes.

Q. Why would you visually observe them completely naked?

A. We always observe them completely naked [10] just – just to make sure they have no distinguished cuts, no bruises, make sure because some people come in and something might be wrong with them. They might have, you can see they have a bad bruise, might be internal bleeding or might be a cut on them that they don't want to say anything that's infected we have to send them out.

Q. Would it be important to see during the visual observation if they had a bad bruise maybe on their buttocks?

A. If they turn around and do have a bad bruise on their buttocks we do observe it and we ask them what might have happened, what might have occurred at the time to get that bruise.

Q. So the only way to observe that bruise on their buttocks is they would have to remove their undergarments, meaning their underwear?

A. Yes.

Q. So that would be the observation you would make on a non-indictable offense?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. So what's the procedure then – let me [11] just continue. On a non-indictable would you also ask them to lift their genitals?

A. No.

Q. You've never done that?

A. No, I haven't.

Q. Do you know if any other corrections officers, to the best of your knowledge, would ask them to do that?

A. I have no idea what anybody else might have done inside the shower or whatever. But as far as I'm concerned, I don't do that.

Q. So what is your procedure for an indictable commit when they enter the shower room with you?

A. An indictable commit pretty much has the same observation. We have them lift their genitals, bend over, make sure nothing is being like really passed through the jail. We go through everything with them. Almost like a fine tooth comb.

Q. You go through their hair, check their ears?

Appendix O

A. Yes. Underneath their tongue, tell them run their fingers along their gum line and everything.

[12]

Q. Who gives you the permission to strip search a commit?

A. Whatever sergeant is on duty.

Q. When a strip search is performed you take them into the shower area behind a curtain; is that correct?

A. Yes.

Q. And you stand there and what is your direction for a strip search?

A. Pretty much we tell them to remove their clothes. They remove their clothes. They hand them to us. We go through them. Tell them open their mouth, lift their tongue up, run your fingers through your hair, run your fingers along your gum line, turn around, lift your feet up, check the bottoms of their feet. Bend over and spread 'em, spread 'em open, turn back around. Lift your genitals up, whatever and pretty much give them their soap, their wash cloth, Kwell them. Put them in the shower.

Q. What is your procedure for what you call a visual observation, take me through that, exactly what you would say to the person?

Appendix O

A. Visual observation is I need your clothes. Take their clothes. A lot of times [13] they ask you socks, underwear too. Socks underwear too. Comes off. Lay 'em down on the bench or chair whatever we have in there.

Q. You lay down the clothes on the bench?

A. Yes. Tell them to turn around. A lot of times they turn around. The first thing they do is they think that you want to check 'em like a strip search. No, keep turning. Keep turning. I look at any distinguished marks like tattoos, any piercings, you know, piercings have to come out. Like I said, any cuts or bruises. That's the visual observation.

Q. During your visual observation have you ever found a piercing on the genitalia?

A. Yes.

Q. You have them remove those piercings?

A. Yes. I've also found tattoos on the genitalia also.

Q. During a visual observation?

A. During a visual observation.

Q. Where do you get your training with respect to a visual observation and strip search procedures?

Appendix O

A. The training pretty much comes as like when you get the bid for the booking area the * * * [14]

* * *

[23:1]

A. Correct.

Q. And what's the difference between that observation and inspection, is there a difference?

A. Between observing and inspecting?

Q. Yes.

A. It's pretty much the same.

Q. Is what you're saying the next process with a strip search above and beyond the visual observation is you actually ask them to spread their cheeks or lift their genitals. Is that a difference between a strip search and a visual observation?

A. Yes.

Q. So the visual observation stops at turn around and let me view you completely naked, front and back?

A. Yes.

Q. And the search would go the next step in your knowledge of spread your cheeks, correct?

A. Correct.

Q. Would they bend over and cough in a strip search?

A. Yes.

Q. Also you check their hair, ears and [24] everything else?

A. Yes.

* * * *

APPENDIX P — EXCERPTS OF ORAL DEPOSITION OF DOUGLAS D. CHILTON, DATED DECEMBER 7, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 05 CV 3619 (JHR)

Oral Deposition of:
Douglas D. Chilton

Albert Florence,

Plaintiff,

vs.

Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and officially as warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; State Trooper John Doe, individually and in his capacity as a State Trooper and John Does 1-3 of Burlington County Jail and Essex County Correctional Facility who performed the strip searches and John Does 4-5,

Defendants.

* * *

Thursday, December 7, 2006

* * *

Appendix P

[20:14]

Q. So from that period that you were a sergeant is it correct to say that your duties were to sign off on strip searches, part of your duties were to sign off on strip search forms, authorization forms?

A. Yes.

Q. With respect to commits?

A. Yes.

Q. When is it proper to do a strip search in your – as you know it in your capacity as a corrections officer?

A. For an indictable crime.

* * *

[24:2]

Q. At the bottom it says that the individual was not strip searched. It's checked off?

A. Yes.

Q. Do you make that determination whether an individual is strip searched or not?

A. Yes.

Q. Do you recall why you would not strip search this particular individual looking at that paperwork?

A. From my knowledge of the case or just by looking at that piece of paper?

Q. Right now looking at that paper.

A. No.

Q. From the knowledge of this case why would you check off the individual is not strip searched?

A. Because he has a commit for failure to appear.

Q. What's a commit for failure to appear?

A. It's a non-indictable.

Q. So that's not a serious charge that would require a strip search?

A. Correct.

Q. But is it a charge enough to require a [25] visual observation as you call it?

A. Yes.

Q. And everybody gets visually observed if you determine that they shouldn't be strip searched as you

call it, they at least have to be visually observed; is that correct?

A. Yes.

Q. So then at the bottom here you check off and say the individual was showered, Kwelled and visual observation was made for recent injuries; is that correct?

A. Yes.

Q. What's the purpose of a visual observation to look for – did I ask this already?

MS. SAVAGE: I don't think here you did.

Q. What is the purpose of a visual observation with respect to that sentence to look for injuries, what injuries are you looking for?

A. Scuffles with the police, sometimes they have injuries they don't know it. To document if they are injured so if they are injured you can tell the police officer while he's still there before you assume custody.

* * * *

APPENDIX Q — EXCERPTS OF ORAL DEPOSITION OF SEAN M. GALLAGHER, DATED DECEMBER 7, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 05 CV 3619 (JHR)

Albert Florence,

Plaintiff,

vs.

Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and officially as warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; State Trooper John Doe, individually and in his capacity as a State Trooper and John Does 1-3 of Burlington County Jail and Essex County Correctional Facility who performed the strip searches and John Does 4-5,

Defendants.

Oral Deposition of: Sean M. Gallagher

* * *

Thursday, December 7, 2006

* * *

Appendix Q

[22:11]

Q. Could you tell me your definition of a strip search as you know it in your official capacity as a corrections officer?

A. The term strip search is apparently a loosely used terminology for when we take them in and search them. As far as the type of search we give them depends on their charges as I've explained.

Q. When they're processed, the commits, are they separated into indictable and non-indictable cells?

A. Yes, they are.

* * *

[32:1]

Q. So a civil contempt, you said, is a non-indictable offense?

A. Correct.

Q. Does non-indictable mean it's not a felony? What's the definition of non-indictable?

A. Non-indictable is a non-Superior Court. It is any charge that would not be given state time or possibility of given state time.

Q. So does a – you said people come in on traffic infractions to your facility, correct?

A. They are not brought in on a traffic infraction. They are brought in – traffic infractions are most often given summonses and if they fail to appear for that summons then it is issued as a warrant for failing to appear.

Q. So a failing to appear in court would be on a warrant – a summons – a warrant would be issued?

A. A warrant would be issued for them. From a municipal court judge.

Q. Is that a non-indictable offense?

A. Yes.

Q. So you are on duty and Mr. Lesky comes in on a warrant, the warrant that you were just [33] speaking of which is a non-indictable offense. He would be processed the same way to take off all his clothes and you would visually observe him and have him turn around?

A. Yes.

Q. If he came in without – would you know what his Rapp sheet, would you have a Rapp sheet on him? Do you know what a Rapp sheet is?

A. No, ma'am.

Q. His listing of if he had any prior crimes?

A. No. I would not have any access to that.

Q. So that – you wouldn't know each commit's prior history?

A. We may know – depending on who was looking them up in the system and entering them into the computer we would see if they've had any priors in our county. That's all we can go by

Q. You don't go by the statewide system or nationwide system?

A. I don't have access to that, ma'am.

Q. So before they come to you somebody else might have access to that, correct, someone else in the Burlington County facility would have looked that up?

[34]

A. No. When they would come in the police would bring them in with the charge. We look to see if they've ever been in our facility before. But we don't —

Q. What's your understanding or definition of the words reasonable suspicion in the context of strip searching?

A. That just would be made by a supervisor as far as if the – I'm assuming being that it's not my position to make that decision the supervisor would use possibly any notifications from the police officers bringing him in as to the situation surrounding his arrest. That would constitute reasonable suspicion. If he has been brought into our facility before and he is a known problem in our facility with having contraband in the past that would be a reasonable suspicion.

Q. So that would heighten the level of bringing it to a strip search where – do you squat and cough, do you have them squat and cough when they are strip searched?

A. I don't do the squat and cough, no. I have them spread the cheeks for the indictable search. [35]

* * *

[52:1]

A. Any body hair.

Q. Do you show them or tell them specifically where to apply it or you just tell them – what are your exact instructions if somebody was standing before you right now and you handed them the delousing shampoo, what exactly would you say?

A. This is the delousing shampoo. Use it in all your body hair. Let it set for a couple seconds to a minute and – 30 seconds to a minute and then shower off

and continue your shower, dry off and come out and dry yourself off and get yourself dressed.

Q. Do you ever observe the application of the delousing agent to insure adequate coverage?

A. Yes.

Q. While they're in the shower?

A. Sometimes.

Q. Why would you do that?

A. They are required to use the shampoo. So if an inmate seems like he is not going to use it I make sure they put it on themselves.

Q. When you give them the directions to use the delousing are they always naked when you are giving them the directions? [53]

A. Yes.

Q. Now, you have no authorization if a commit was complaining about his being there wrongfully, such as this warrant was satisfied. I shouldn't be here. It is not your call to say okay, we need to take you out. You bring it to your supervisor's attention, correct?

A. Correct.

Appendix Q

Q. And whatever your supervisor tells you you proceed with his directions, correct?

A. Yes.

Q. Who hands the inmates their, I call it a welcome kit, welcome to the jail. What do you call it the toothbrush and –

A. Care kit?

Q. Care kit. Who hands the inmates that?

A. Either myself or my partner.

Q. After they shower?

A. Yes.

Q. What's in that kit?

A. A toothbrush, toothpaste, comb, bar of soap and a deodorant.

Q. Where is the toilet paper?

A. Toilet paper is kept by the tier officers on the tier. [54]

* * * *

APPENDIX R — EXCERPTS OF DEPOSITION OF ALBERT FLORENCE, DATED DECEMBER 22, 2006

EXCERPTS FROM DEPOSITION OF ALBERT FLORENCE

* * *

[26:3]

MR. RUDDY: Was that the charge or was that – because that's a general term. You want to describe. Why don't you describe the incident that formed the basis of this. Do you remember?

THE WITNESS: Is he asking?

* * *

[27]

Q: Sir, what happened?

A. In December of '95 I was stopped on a busy intersection at night, and the officer pulled me over and asked me for my driver's license. He then asked me whose vehicle this is, and I responded it was my cousin's vehicle and then out of fear I pulled away.

MS. LASK: Oh, okay. This is December of '95?

THE WITNESS: Yes.

MS. LASK: Okay. Okay. I got the dates wrong.

Q. And then what happened?

A. I pulled away and I went home.

Q. What happened thereafter?

A. I'd say a week went by and the cops showed up at my door.

Q. And what happened at that point in time?

A. They told my mother why they were there and proceeded to put the handcuffs on me.

Q. And then what happened?

A. I was taken to Maplewood police department where I was –

MR. RUDDY: This happened in [28] Maplewood the incident?

THE WITNESS: Yes.

MR. RUDY: Okay.

A. Maplewood police department where they fingerprinted me, took photos and my parents had to come and bail me out.

Q. Did your parents do so?

A. Yes.

Q. When did they do so?

A. I think two hours later.

Q. When you were at the police station, did you remain there for that time?

A. Yes.

Q. Did you ever go to a jail?

A. I don't understand what a jail is, and I'm being honest because I want to be correct and accurate. What is a jail?

MR. RUDDY: A cell. A jail cell.

A. No, I was never placed in a jail cell.

Q. Where did they hold you during this time at the Maplewood police department?

A. Maplewood police department I was handcuffed to a bench.

Q. What were your charges?

A. Obstruction of justice.

Q. Any other charges?

A. Possession of a deadly weapon.

Q. Now, when you say possession of a deadly weapon, what weapon was it?

A. They were referring to the automobile.

Q. Any other charges –

A. – stemming from that incident?

Q. Yes.

A. No.

Q. What happened thereafter, after your parents bailed you out?

A. After my parents bailed me out, I was given a court date, a notice to appear in court.

Q. And did you appear?

A. Yes.

Q. What court did you appear at?

A. The Newark courthouse.

Q. Do you remember when?

A. I'd say in the spring of '96.

MR. RUDDY: Excuse me?

THE WITNESS: Spring of the following year, 1996.

[30]

Q. What happened at that court appearance?

A. Well, at that court appearance I was asked if I had a – had a legal lawyer or legal counsel, and at the time I couldn't afford one so I was appointed a court appointed attorney.

Q. What was the name of that attorney?

A. I don't recall his name.

Q. And what happened thereafter?

A. I appeared before the judge, the attorney instructed me to not say anything how I wanted to plea, informed me of the ramifications if I decided to plea or if I didn't decide to plea, and he spoke on my behalf.

Q. What did you ultimately end up doing?

A. I ended up pleading guilty to a less charge.

Q. Do you recall what those charges were?

A. I do not recall.

Q. Were you sentenced?

A. Describe sentence. I'm not sure.

[31]

Q. Did the judge give tell you [sic] what your punishment was going to be for that lesser charge?

A. Yes.

Q. And what is that?

A. He gave me two years of probation.

Q. At any point in time were you in jail out of this incident, in a cell?

MS. LASK: Was the question asked and answered?

MR. RUDDY: No. That night was asked.

A. Can you repeat that. I'm sorry.

Q. At any point in time for this incident did you spend any time in a jail cell?

A. No.

Q. What about at any other point in time. Have you ever spent time in a jail cell aside from March 3rd, 2005?

A. No.

MS. LASK: Excluding the incident, correct?

MS. SAVAGE: Exactly, right.

MS. LASK: Okay.

Q. Do you have any other times when [32] you have been charged with a crime other than what you've already told me?

A. No.

MS. LASK: Objection. He said he plead to a lesser charge. He didn't say he pled to a crime.

MR. RUDDY: You know you can't make that kind of objection.

MS. LASK: Well, I'm making it.

MR. RUDDY: You can't testify for him. It's not your deposition, it's his.

MS. LASK: Be quiet. It's her questions and I'm talking to her.

MR. RUDDY: It's not her deposition. It's the deposition in this case.

MS. LASK: She's asking the questions, and he didn't say he plead to a crime, he said a lesser charge, and I think in New Jersey there's charges that might not be crimes; is that correct?

MS. SAVAGE: Okay. That's fine.

MS. LASK: That's fair.

Q. Are you aware if the charge, the lesser charge was a felony?

A. I was not aware.

* * *

[48:1]

[ABERT FLORENCE]

A. [B]efore we got off the exit we noticed a State Trooper was following us so we proceeded to go on C-630, and about a mile off the exit the Trooper put his lights on and motioned for us to pull over.

Q. And then what happened?

A. He took a good five to seven minutes to come out of the car, which I've been stopped a lot of times and that

was a long time to come out of the car, so my wife, and I was wondering why he was taking so long to come out of his patrol car.

Q. Did she stop right away when she saw the lights?

A. Yes.

Q. Then what happened?

A. The officer came to my side of the vehicle. I was on the passenger side and he asked my wife for her driver's license, registration and the insurance card.

Q. Was your wife a licensed driver?

A. Yes.

Q. So what happened then?

A. He then asked me whose vehicle does this belong to and my wife told him it's my [49] husband's vehicle and my wife asked – the police officer asked who was your husband, my wife replied his name is Albert Florence, he's right here. The officer asked me, are you Albert Florence, I said yes, and then he told me to step out of the vehicle.

Q. And then what happened?

A. The officer walked me over to his patrol car, didn't say anything, walked me over to the patrol car. Once we got to the patrol car he told me to put both of my hands

on the hood of his vehicle.

Q. Then what?

A. He told me I was under arrest which I didn't understand why. He would say something like that.

Q. Did you say anything to him?

A. Well, at that point my wife was going crazy because she didn't understand why were being pulled over, number one, because we did nothing wrong, and she didn't understand why I was being handcuffed in front of my four-year old son Shamar at the time, and he was crying as well.

Q. So what happened then?

[50]

A. The officer then told me why he put me in handcuffs.

Q. What did he say?

A. He says that there's a warrant out for my arrest.

Q. How did you respond to that?

A. I said what warrant? Why would you pull me over, and why is there a warrant for my arrest, and he told me

to sit in the back of his patrol car.

Q. Was it just one State Trooper?

A. No, at that time that I was in the back of his car sitting another pulled up.

Q. After he told you to sit in the back of his patrol car, what did he do?

A. At that point my wife was yelling and crying and talking to the Trooper trying to find out why I was in the back of the car and why we were pulled over and like what is going on. So the State Trooper told my wife what was going on, and I could hear the conversation because they were right in front of the car door. So I told my wife to look into the glove compartment and get out the letter that I got from the state.

[51]

Q. Did she do so?

A. Yes.

Q. Did she show it to the police officer or to the State Trooper?

A. Yes.

Q. What happened at that juncture?

A. The State Trooper reviewed it. He motioned for the other gentleman to come over because at that particular time the other gentleman was trying to calm my wife down. She was pregnant. She was crying, and she was hysterical, crazed because she didn't understand the circumstances of what was happening. So the officer I could see him look at it with his flashlight reviewing it. I do recall him radioing in. He was always on his radio talking to someone else on the other end, I guess waiting for instruction or trying to find out what to do at the next point.

Q. What happened – then what happened?

A. After that the officer – both officers explained to my wife we have to take him in, we have to take him into custody. I do remember him saying to my wife this will be all [52] over in a day. They'll release him once this is all clarified. When this is all cleared he'll be released in a day.

Q. Do you recall what day of the week this was?

A. It was a Thursday.

Q. So what happened thereafter?

MR. RUDDY: Could I just ask about the letter because I don't think he's explained what the letter is.

MS. SAVAGE: Yeah, I'll – thank you.

Q. Actually what was the letter that you showed to the police officer?

A. It was a letter of satisfaction.

* * *

[69:14]

Q. So once you enter the stall what happened at that point?

A. Once I enter the stall a Caucasian gentleman came up and instructed me to put my items, my personal items on the bench and to take off all my belongings and put them, you know, put them on the bench.

Q. What specifically did he say? Tell me exactly what he told you.

A. He told me to – he said I need you to take off all your clothes.

Q. Yes.

[70]

A. And then as – after I took off my clothes he asked me if I had anything in my mouth, told me to open my mouth. I opened my mouth, he asked me to lift up my tongue. I lifted up my tongue. He told me to have my hand at shoulder length. That's all. Told me to turn, 360

turn, so I turned all the way around. He said, okay, you can drop your hands down, and he instructed me to lift up my genitals which at that point even being in front of a man I have never been in front of a man who's, you know, being seen naked in front of a man so being naked in front of someone especially a guy especially what I was going through and what was inside of my head I was a little freaked out about it.

MR. RUDDY: Could you describe this gentleman?

THE WITNESS: Average height. Six foot height, very – not obese. He was very obese.

MR. RUDDY: Very obese, fat?

THE WITNESS: Yes, short hair.

MR. RUDDY: Did he have a full uniform on?

[71]

THE WITNESS: He was – it kind of seemed weird. At that point it didn't seem like – he didn't look like a cop because you really didn't see. He didn't have on a tie. I couldn't really see his actual badge or I didn't see a gun.

MR. RUDDY: So he was in plain clothes you would say?

THE WITNESS: I wouldn't say he was in plain

clothes. He was in uniform, but he didn't look like he was an actual cop because he didn't have, you know – he was very disheveled in terms of his appearance.

MR. RUDDY: If I might, Karen, one follow-up on that. When you say he's in uniform what do you mean by he was in uniform?

THE WITNESS: Meaning that he had a uniform on but he didn't look like he was an actual police officer because I didn't see a gun. I didn't see an actual badge or any of those decals that they wear on their shirts. I just saw something that said Burlington County and that was it.

Q. Okay. Now after – so after he – [72] after he looked you over what happened at that juncture?

A. He looked me over and then he told me to – he said you are going to shower up. You can lather up or if you want you can just rinse off. I wanted to kind of rinse off and just kind of take it all in because a shower kind of calms me down and I remember taking, you know, advantage of, you know, a couple extra minutes.

Q. Now, when he told you to take a shower, did he give you soap?

A. No.

Q. Was soap already there?

A. He just gave me a towel and the orange jumpsuit.

I remember asking him what should I do with my boots, and he said just put your boots underneath the bench, and once you are fully clothed you could put your boots back on.

Q. And once he directed you to the shower where – did he stay with you?

A. No. At that point I couldn't even see if he was still there or not because that shower is – it's the neck area in. You can't [73] even see the opening anymore.

Q. Were you given any type of liquid gel, essentially, delousing agent?

A. What is that?

Q. Were you given a liquid in a cup essentially by an officer to put on your hair and body hair?

A. No, he told me to shower up, and he said if you'd like there's soap there, and that's the soap I used.

MR. RUDDY: Do you mean what he did when you were showering?

THE WITNESS: No, at that point I couldn't see. After he finished observing, you know, looking at me with no clothes on, naked, I just wanted to get away from him as quickly as I could.

Q. After you showered, what did you do?

A. I dried, I dried off. I put my underwear back on.

* * *

[127:5]

Q. What happened thereafter?

A. Afterwards we were directed to the next part of Essex County where there's a separate – five separate closets, if you would, and each particular closet there was a shower in that particular closet so they would call us up in groups of five and the first five will come, they enter in the room, they would take all their clothes off, they would shower. They would come out and then there were two other officers that were on like a partition or podium. They were above, you know, the inmates and they were instructed inmates on what to do. When I went and I took my shower I was actually – the thing that stuck out of my mind was they once – before I even got into the shower that they actually were handed out bags of like toothpaste and the comb I got and a toothbrush and a soap. I was kind of satisfied because, you know, I didn't brush my teeth in a while, definitely hadn't showered in a while, so that [128] was probably the lone bright spot other than sitting.

Q. Now there were five separate showers?

A. Yes.

Q. And were you just told to go in and shower?

Appendix R

A. The officers. Not just me but the officers, the officer told the five of us to go in, you are going to strip all the way down, you are going to shower, you are going to come out and then we'll instruct you what to do afterwards.

Q. And when you came out were you clothed when you came out?

A. No. When I came out fully naked and showered already.

Q. Along with the other four individuals?

A. Yes.

Q. After you did that, what did they instruct you to do?

A. The instructor asked us all to open our mouths, asked if anyone had anything foreign in their mouth, any substance at all in [129] their mouth. He then asked us to lift our genitals. It was kind of – it was painfully because, you know, as he was telling me this I kept visualizing being stripped naked at Burlington and now being stripped naked at Essex so I kind of froze for a second and I could see the guy looking at me like, hello, let's get with it. So I continued to do what he said, open my mouth. They instructed us to lift up our arms shoulder length again all right when he turned around at this particular point which was a little uncomfortable as well he told us to turn around. He started together a complete 360 once our backs

faced him all to squat and to cough and then we had to turn back around again.

Q. Had they asked you to do that in Burlington?

A. In Burlington I was not asked to do that.

Q. And after that was completed after you were asked to squat and cough what did you do?

A. Afterwards we stood there. It was kind of eerie because we were just standing there while these officers were like peering [130] you.

Q. How many officers?

A. Two.

Q. They were looking at you and were just looking and you almost –

A. You spot one guy and you pe[e]k to your left and one guy is kind of staring at the other guy. You pe[e]k to your right and the other guy is staring at you, that was very uncomfortable. Like an uncomfortable experience, you know, because I had those same feelings even though it was one guy at Burlington I had those same feelings at Essex like, you know, these officers they really don't care about you. They are looking at you, it's fun to them. It was very uncomfortable to be stripped, especially stripped naked and having men look at you and grown men like your father. You can kind of visualize your father.

Q. At what point? Well, what happened thereafter?

A. After that they gave us jumpsuits again, and it was weird because they kind of gave you bubble gum shoes. Actually sailor [131] shoes, thick soles, and he gave us those, and we went onto the next process which was to see the nurse.

* * *

[131:12]

Q. And were you put into a general population at that point in time?

A. At that point in time it was Wednesday evening heading into Thursday morning so what they did they took us to the jail, they assigned us to the rooms and at that point we went to bed.

Q. Were you in a cell by yourself?

A. No, I was with another inmate.

Q. Do you remember his name?

A. No, I don't recall his name.

Q. Were you given bedding?

A. Yes, I was provided with bedding.

Q. And when did you then leave? When [132] did you leave?

A. Leave you mean?

Q. When you left the cell you said you left the next morning?

Q. Well, we had breakfast that next morning. We were allowed – unlike Burlington County, we were allowed to – I wouldn't say wander about the facilities but we were – Essex County was a system in which you go into one area, and it's I can't even describe the room dimensions because it was very, very large. It encased many, many or some odd different cells and that actual cell block, if you would, was managed or whatever, supervised by one correction officer. So he didn't allow us to fully wander about.

Q. If I understand you correctly, there was a common area surrounded by cells?

A. When you say common areas.

Q. Common area there were cells all around and there was an area where you mingled?

A. Mingled you had a upper tier, it's like a horseshoe because the front of it was all glass and then you had a lower tier which was also a horseshoe as well and they you had the [133] desk right by the entrance.

Q. Did you understand this to be general population?

Appendix R

A. I'm not familiar with any of the characteristics in terms of what is general population, what isn't, but unlike Burlington I was unable to come out of the cell.

* * *

[206:25]

Q. If you look at these charges those [207] seem correct based upon your recollection?

MS. LASK: Well, is this –

MR. RUDDY: You can't testify, Susan.

MS. LASK: I'm not testifying I don't understand the damn document.

MR. RUDDY: You're yelling and cursing.

MS. LASK: I'm yelling and cursing?

MR. RUDDY: Yeah.

MS. LASK: It's about time someone yells back at you. Aggravated assault is that one charge?

Q. Do these here reflect this is the final disposition I believe down here. Disposition. These are the two dispositions?

MR. RUDDY: You have to say where it is.

MS. SAVAGE: I realize that.

MS. LASK: Yeah, we're getting to it.

Q. This is your indictment number, we're pointing to the third from the bottom in terms of the FBI from Essex County where it has the two charges. You were convicted obstruction [208] of law and hindering apprehension which you testified to earlier.

Is that —

MS. LASK: You are asking are these the charges he pled guilty to?

A. Uh-huh.

MS. LASK: Do you recall?

THE WITNESS: I recall the obstruction, but hindering I don't recall hindering at all.

MS. LASK: Do you recall if these other charges were your initial charges aggravated assault?

THE WITNESS: Yes. This initial charge, the aggravated assault and possession of a weapon.

MS. LASK: Okay. Thank you very much.

MR. RUDDY: I have couple on this.

THE WITNESS: Sure.

Q. Do you know what the basis of aggravated assault was? Do you remember what they done?

A. They claim that the car was the weapon.

[209]

Q. That you attempted to run somebody over. Is that what you mean?

A. They just say the car was the weapon. They didn't say I attempted to run over anyone.

Q. The other thing I want to ask you at the bottom left at the bottom, amount assessed $250 was that ultimate sentence that you had on the charges?

A. What are you saying sentence? Characterize that.

Q. Well, the sentence you had to pay $280 according to this record?

MS. LASK: That's not what we're saying. It just says amount assessed.

MR. RUDDY: 280.

A. Assessed to what?

Q. To you. It says probation amount is assessed. Do you see that on the bottom left here?

A. No. It says probation two years. That's what it says. If you are reading it from left to right you have to read it from left to right the way. I read it. It is probation two years, then it says amount assessed $280.

* * * *

APPENDIX S — EXCERPTS OF DEPOSITION OF RICHARD MONROIG, DATED FEBRUARY 13, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CASE NO.: 05-3619 (JHR)

ALBERT W. FLORENCE,

Plaintiff,

-against-

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

OFFICE OF THE COUNTY COUNSEL
HALL OF RECORDS, Room 535
Newark, New Jersey 07102
February 13, 2007
9:50 a.m.

EXAMINATION BEFORE TRIAL
OF RICHARD MONROIG

* * *

[6]

Q After the police academy, did you get any other kind of training?

A Well, I had some cell extraction training.

Q Did you get any strip search training?

A Well, we covered that in 10A in the academy.

Q What is 10A?

A That's the procedures.

Q Is that internal procedures or is that a statute?

A That's the statute, I believe.

Q Are there any internal procedures for strip search policies within your employment that you know of?

A We usually go by the 10A.

Q Could you tell me what 10A is, how you understand it?

A Well, 10A has to do with the procedures of the correctional facility, the guidelines, more or less the guidelines.

Appendix S

[7]

* * *

Q What is your policy and procedure that you employ when it comes to a search of an inmate?

A We usually search their clothes when they come in. We don't search them physically. Unless there is reasonable cause, then we will search the inmate thoroughly.

Q And what's a thorough search?

A I guess their hands, their feet, their mouth, their hair.

* * *

[8]

* * *

Q When someone comes in the front door of the facility in 2005, I'm just trying to get a visual of what it's like, are they escorted in with the officer and brought to a desk? Is that the first procedure?

A Right. They come in and they go through a metal detector, which is called a pre-book area, and then from there they are asked simple questions, like, their name, their birthday.

[9]

Q When they are asked those questions, is somebody inputting that into the CCIS system?

A Well, we have a form we fill out and then that's done later on when we do their property and stuff.

Q So the form is handwritten?

A Yes.

Q As you are filling out the form, you are taking general information, name, address?

A Yes.

Q How are you aware right then and there of the charges at that step?

A We look at the paperwork, make sure the paperwork is correct so he can be committed to the Essex County jail.

Q So when you are looking at those charges, do you notice if they are indictable or non-indictable charges for each intake?

A No, I wouldn't know that, no. I'm not that familiar with the paperwork. You know, I'm not a lawyer, so I couldn't tell you if the stuff is indictable or not indictable.

Q Do you know in Essex in, we'll say, 2005, did they separate the prisoners as indictable or non-indictable in any separate cells?

[10]

A No, they all come in together.

Q After the handwritten information is taken, what is the next step?

A They go to the holding cell with the sheriff's department where they are pictured and fingerprinted.

Q And then after they are pictured and fingerprinted, what's the next step?

A The next step is we do data entry. Once again, we ask them their background, medical background, their name, their address. That's put into the computer system. Their property is put into the computer system.

Q The property from their pockets?

A Well, usually the property that comes in, usually we put them in plastic bags and we go through the property and save it for them.

Q Now, between the time that the handwritten paper, you said, is being filled out and then they are taken to the next cell to be fingerprinted and photographed, are they padded down or searched in any way?

A No, no.

Q So after the fingerprinting and photographing, they go to another cell?

A Another area, like, a waiting room.

* * *

[12]

* * *

Q So what happens after the waiting room? What are they waiting to do after that?

A Okay, like I said, we take additional information, their medical background, emergency background, and then after that they're led into the shower area where they take their clothes off and their clothes are searched and they shower and are given uniforms.

Q Who escorts them into the shower area?

A They are asked to walk through the door, everything is wide open.

Q So when they are walking through this wide open thing --

A Well, the shower area is closed in, but they are sitting and the door is behind them, and they walk into the shower area.

Appendix S

* * *

[13]

* * *

Q Could you describe the next room, the shower stall room?

Is there an officer waiting for them there?

A There is an officer waiting there to check their clothes, yes, their belongings.

Q Meaning they take off all their clothes?

* * *

[14]

A They take off all their clothes. They shower and they are given uniforms and some footwear.

Q So they walk into this shower stall and there's -- are there curtains?

A There is no curtains. There is a wall between each one.

Q So they are open from the front?

A Right.

Q And there is a wall separating them?

A Right.

Q Is there soap in that shower?

A Everything is put on a chair, a towel, soap, whatever we have, towels, underwear, T-shirts, socks.

Q So getting back, they are standing, I guess, the three of them. You said there is no more than three people?

A No more than three in there.

Q Now, there is an officer in there. How many officers?

A Usually one officer there.

* * *

[16]

* * *

Q Could all three of them be naked at the same time?

A Yes.

Q So say all three of them are naked at the same time, where do they put their clothes?

A We have a gray bin.

Q In front of them, behind them?

A In front of them.

Q So they put all their clothes in the gray bin in front of them, and then am I correct an officer will go through those clothes?

A That is correct.

* * *

[18]

Q Now, once they are standing naked in front of each other and some officer in that room, the next direction, as you say, is to take a shower; is that correct?

A That is correct.

* * *

[20]

Q Now, before they go into that shower and they are standing there naked, are they asked to turn around?

A No.

Q They are not asked to squat?

A No.

Q Cough?

A No.

Q They are just standing there naked?

A Right. Well, once they finish getting undressed, they jump right in the shower. They don't [21] pose for us or nothing. Once they take off their clothes, they are instructed to take a shower.

* * *

Q And someone is watching them at every point, correct, because they are convicts?

A Right, you have one officer -- yeah, making sure everything is all right.

Q So what if one of those convicts or arrestees, you can call them, out of the three is arrested -- he is in there for a murder, the charge is murder with a weapon, when would he be searched?

How would he be searched to make sure there is no contraband on him?

A Well, I wouldn't know his charges if I'm [22] working process.

Appendix S

Q When they come in that door, the intake door, you said there are papers?

A Right, but the processing officer wouldn't know what the pre-book officer seen, the paperwork.

* * *

[23]

* * *

Q So at that processing stage if, say, one of the three is arrested on drug charges, when is that person checked for contraband that might be in his anal cavity?

A I wouldn't know if he has anything in his anal, you know what I mean. We would have to give him some reasonable suspicion before we would do anything like that.

Q Well, when he is standing there naked, is that a good opportunity for anybody to check?

A No, no.

Q When does the opportunity arise?

A Well, when there is reasonable suspicion.

Q Well, when does reasonable suspicion arise as you are an officer?

A Okay. Maybe something fell out of his hand. Maybe we found something in his clothes. Maybe another inmate told us he might have something on him.

Q Well, what if he is coming in for drug charges or weapon charges, wouldn't that arise to [24] reasonable suspicion to search somebody?

A To search or strip search? There is two different.

Q What's a search?

A A search is -- I don't know if I'm correct, but that's more or less maybe like a pat down. A strip search is when they -- he is asked to squat and cough, is my understanding. I'm not a lawyer, so I really wouldn't know.

* * *

[25]

* * *

So can you give me your definition of a strip search, then?

A I guess a strip search -- I don't know if I'm correct, but that's when you check the person's body, tell them squat, cough, your hands, your mouth, hair.

Q Well, could you just please tell me, in your position as an officer, if you were directed to strip search

somebody, exactly what you would do from step one to step last?

A Well, I will probably take the sergeant's directive. I wouldn't do it on my own. He would direct me on what to do.

* * *

[37]

* * *

Q This document marked Exhibit 1, when does the booking officer see that?

It's as an arrestee comes in; is that correct?

A Right, when they first come in, whatever department brings them in, they come with the paperwork.

Q And that would be part of the paperwork?

A Yes.

Q On that paperwork does it tell you the charge?

A Yes, it does.

Q What is the charge on that paperwork?

Appendix S

A Hindering prosecution by Judge Falcone.

Q Is hindering prosecution an indictable crime?

A I have no idea. I wouldn't know. I guess it would be. I don't know.

Q You guess it would be?

A I don't know.

Q So they don't tell you what's indictable and what's not indictable? No one has trained you on that as well, correct?

A Correct.

[38]

Q Can you just tell me what your definition of, as an officer, what hindering prosecution means?

A I guess when they don't show up for court or they run away while they are being arrested, they flee.

Q They don't show up for court?

A Right.

Q Was that a yes?

A Yes, I guess.

Q What's a contempt of court?

A Well, contempt is when you don't show up or you don't pay the fine or whatever.

Q So you could be arrested for that; is that correct?

A Contempt of court, yes, you could. It's up to the judge.

Q Do you see a lot of that coming through?

A We see a lot of everything.

Q Well, have you seen contempts of court come through?

A Yes.

Q Have you seen Title 39's come through?

A Traffic tickets, yes.

Q And they all get processed the same way?

A Right, everybody gets processed the same way.

* * *

[42]

Appendix S

* * *

Q Is there a strip search form at Essex County that they fill out when they do strip searches?

A A report would have to be made.

Q What does that report look like or what information is on the report?

A I guess the probable cause for the search, the inmate's name, other officers present, whoever else is present, what contraband was found.

Q Have you filled out those forms before?

A No, no.

Q Who fills them out?

A That's the sergeant's duty, the sergeant.

Q And that would be the same exact form used if people are strip searched at the processing level, correct, because I understand that there is people that would be strip searched that are already [43] in the prison, that could happen, correct, meaning someone is in a jail cell in that prison for a --

A I haven't seen the form, so I couldn't tell you. I'm not a superior.

Appendix S

* * *

[44]

* * *

Q You don't recall if you ever did a body cavity search, correct?

A Never, never.

Q You never did any?

A No.

Q And would that be because a body cavity search is only done by a medical person or am I wrong about that?

A Well, right, the only person that can do body cavities is a medical person, doctor.

* * * *

APPENDIX T — EXCERPTS OF EXAMINATION BEFORE TRIAL OF MICHAEL SALZANO, DATED FEBRUARY 13, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CASE NO.: 05-3619 (JHR)

ALBERT W. FLORENCE,

Plaintiff,

—against—

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

OFFICE OF THE COUNTY COUNSEL
HALL OF RECORDS, Room 535
Newark, New Jersey 07102
February 13, 2007
12:25 p.m.

EXAMINATION BEFORE TRIAL
OF MICHAEL SALZANO

* * *

Appendix T

[6:8]

Q. Where were you mainly working in the year 2005, from January 2005 to December of 2005?

A. I'll say more intake. That's where I was usually scheduled, but they pulled me from there when they needed me.

Q. So are you here today because you are very familiar with intake procedures; is that correct?

A. Yes, I guess so, yes.

* * *

[7:15]

Q. What kind of searches have you ever performed?

A. All, pat search, frisk.

Q. Strip search?

A. Strip search, yes.

Q. When was the last time you performed a strip search?

A. Probably when I was an officer.

Q. When was that, about? Just the year.

A. 1996.

Q. Then from '96 to this date, you have [8] never performed a strip search?

A. No.

Q. From 1996 to this date, have you 4 performed pat searches?

A. No, supervisors usually don't do it.

Q. Do supervisors authorize the corrections officers to perform the search?

A. That's the *way* it's supposed to go, yes.

* * *

[8:21]

Q. Are you talking about a strip search report?

A. There is a strip search report, yes, there is.

Q. Who fills that out?

A. The person making the strip search.

[9]

Q. And supervisors never do a strip search; is that correct?

A. It's very rare that it would happen. Usually, no. It can happen. If that's what needs to be done at the time, it could happen.

* * *

[9:9]

Q. Then nine times out of ten It's the corrections officer who performs the search and is the person that will fill out the strip search form?

A. Yes.

Q And that's proper procedure?

A. Right. It will go to that supervisors [sic] after that, so on up the chain.

Q. The form would?

A. Yes.

Q. And the supervisors would review the form?

A. Right.

Q. And the only way that a corrections officer would be fitting out that form, anyhow, is because he was initially authorized to do the search?

A. Yes.

* * *

[11:21]

Q. Does anything go into the prisoner's file that he was strip searched?

A. Well, there isn't too many strip searches that goes on, and if it does go on, the report goes upstairs. [12]

Q. What's your definition of a strip search?

A. My definition would be stripping somebody totally and actually searching the body.

Q. There's two things you said. Stripping somebody down totally is the first thing, correct?

A. Yes.

Q. So stripping someone down?

A. Right.

Q. And how does someone strip down? They are directed by an officer?

A. Well, everybody coming into the jail has to shower. It's in the inmate handbook that they are not allowed to go into the cells without taking a shower. There

are showers and there's a gray bin that they put their clothes in. They take a shower and we search the clothes. They are given a uniform, the towel, whatever else they are going to need to go upstairs, what they are allowed to keep on their person. As far as what clothes they came in with, those are left in that bin on a gray chair next to them. They come out and get dressed and they are told to take whatever they need that's allowed out of that bin. That's the whole procedure.

Q. When was the last time that you gave direction for that procedure in that shower room?

[13]

MR. RUDDY: Object to form.

Q. When was the last time you have been in that shower room?

* * *

[13:14]

Q. Are there times when five men would be in those stalls?

A. No, because there are only three.

Q. Why?

Appendix T

A. There are five on – there [sic] a total of ten showers. There's ten altogether. There's five on one side of the intake area and five on the other side of the intake area. The ones on the other side are very rarely used. The ones on this side, we have no storage for the uniforms and everything else right at our fingertips and same thing with the bags the inmates put their clothes in. [14] So the first shower stall is used to store the inmate bags. So that's at our fingertips, again, so we could pull them out. Each inmate gets a black bag assigned to them which has their clothing listed on it. The officer searches the clothing, takes the clothing, puts it in a clothing bag and is sent up to the clothing area. Prior to the inmate coming into shower, a uniform is given, a towel, T-shirt, undergarments as far as boxers, soap, toothpaste, everything that they are supposed to be given is set up on the gray chair on the outside of the shower for them.

Q. Each shower has a gray chair?

A. Three. The fifth shower on the way out is where we have shelves to hold all the uniforms that we are going to need to give out to the people coming in along with big bins. Because the area is small and tight, you can't use the first and last shower, because you have all the storage in there. [15]

* * *

[15:11]

Q. So you are saying there's a door that they walk into the shower area, there's five stalls on one side of the wall, and the first stall is used for storage?

A. Right.

Q. And the last stall is used for something?

A. Right.

* * *

[17:8]

Q. How many officers can there be that you have seen in that shower room?

A. Three.

Q. Up to three?

A. Usually it's one person per inmate coming in for more or less safety issues, but there can be less. There can be one officer and he searches each individual coming in one at a time, searches the clothes, the shoes, jacket, stuff like that.

Q. But then at some point all three of them are standing there in front of their gray chair?

A. No, once they disrobe, they step right in the shower.

Q. Do they come in three at a time to the room?

A. It all depends how fast they get processed. One guy can get processed faster than somebody else, and that one person can be called in.

* * *

[20:19]

Q. So what directions are you authorized give people in that shower room, to remove their clothes?

A. Yes.

Q. And go in the shower stall and take a shower?

A. Yes, for the same reasons that we do now. [21] They have to take a shower before going upstairs. That's in their inmate handbook, their rule book.

* * *

[22:11]

Q. So just as an example, those traffic stuff detainers, do they get processed exactly the same way as everyone else?

A. Everybody is treated exactly the same.

Q. So they go in the shower area and it's three at a time?

A. Yes. It could be less.

Q. Or it could be three —

A. The maximum is three. There are only three showers available to be used.

* * *

[23:7]

Q. Well, they are directed to take their clothes off before they shower, correct?

A. Yeah. I can't see anybody going in with their clothes. I have seen it, though.

* * *

[23:14]

Q. Is there a policy or procedure to check for identifying body marks or tattoos or needle marks on the body?

A. Not necessarily. Anything medical, we try to let medical handle. There is a set of questions which we have a risk form that we fill out that the officers do. There are certain questions that are answered on that risk form as far as medical so we can make the medical department aware of the medical aspects.

Q. When they are standing naked in the shower area, is anybody trying to at least visually [24] observe for a tattoo?

A. A tattoo, depending on if they are – yes.

Q. Is that part of your policy and procedures –

A. No.

Q. – as an officer to at least look for some identifying marks?

A. No, because we usually ask them that question.

Q. Do you ask them, do you have any identifying marks, and they will say yes or no?

Q. Yes or no.

Q. And when they are naked, do you try to make sure that they told you the truth when you asked them do they have any tattoos, identifying marks or anything like that?

Do you use that as an opportunity to insure that they told you the truth?

A. No.

Q. When do you –

A. Right there when we ask them, a lot of times their tattoos or marks are on their arms or chest or back or neck or under their eye or on their hands so you could see them.

Appendix T

Q. You could see the tattoos on their back?

A. Yes, they take their shirt and pull it down.

[25]

Q. So when they come in processing, you look down their shirt?

A. No, we ask them if they have any tattoos, especially gang tattoos, and if they say, yeah, I have one on my shoulder, I want to see it, and they will show us a tattoo on the shoulder or forearm or hand. The ones on their face, we can see, because we are looking at them.

* * *

[34:24]

Q. What's a body cavity search? How is that done?

* * *

[35:1]

A. Do I know how that's done or if we do them?

Q. Have you ever done one?

A. Absolutely not

Q. In that processing area, you don't do them?

A. No.

Q. Could you just give me your definition of what it would be, then?

A. Looking up in the orifices of a male or female.

Q. Would a squat and cough be part of a body cavity search?

A. Yes, it probably would, yes.

* * *

[44:18]

Q. As a lieutenant, have you authorized any strip searches during your time as lieutenant of intake?

A. No.

* * * *

APPENDIX U — EXCERPTS OF EXAMINATION BEFORE TRIAL OF THOMAS LOGUE, DATED FEBRUARY 13, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CASE NO.: 05-3619 (JHR)

ALBERT W. FLORENCE,

Plaintiff,

—against —

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

OFFICE OF THE COUNTY COUNSEL
HALL OF RECORDS, Room 535
Newark, New Jersey 07102
February 13, 2007
11:10 a.m.

EXAMINATION BEFORE TRIAL OF
THOMAS LOGUE

* * *

Appendix U

[11:9]

Q. Could you tell me the process of when an arrestee comes into the front door of that booking office, I'll take it step by step, is the arrestee brought in with another sheriff or officer and, I guess, they come into an initial room?

A. Yeah, when they come into the facility, they come into the front door, the shackles are taken off, because they have to go through a metal detector, then the pre-book area where their personal belongings, like, wallets, jewelry, et cetera, we go through that and we log all that in.

Q. When you say we, is there one person at the desk?

A. It depends. It could be one person there or two officers at that time.

Q. And that person or persons, are they handwriting it down on a sheet? [12]

A. Everything is getting handwritten down and then it gets brought over to the – there's different paperwork. One is pre-book. Then there is an intake sheet once they come onto our side.

Q. Is the intake sheet handwritten?

A. Yeah, the information is handwritten.

Q. At any time at that front desk, are they typing info into the CCIS?

A. Yes, into the computer.

Q So it's handwritten?

A. And typed.

Q Typed in by the booking officer sitting there?

A. Yes.

Q. So then what happens with that computer sheet, that computer input, is it printed out right then and there?

A. No, it's in the system being saved.

Q. Is the handwritten paper put into a folder and travels with –

A. Travels with the inmate. It would go from there and it goes into a bin on the sheriff's side. The inmate is then placed into a holding cell and then the sheriff –

Q. At the holding cell, is he placed with [13] other inmates as well that may be there?

A. There are other inmates in there at that time.

Appendix U

Q. Now, when the inmate comes in, are they brought with paperwork as well?

A. No, we bring the paperwork over ourselves.

Q. No, the arresting officer that is bringing the inmate in –

A. Oh, yes, yes, he has paperwork and any victim notes or anything like that.

Q. And you are able to look at the – should we call it pre-booking?

A. That's what we call it.

Q. The officer or officers can see the charges right then and there?

A. They see the charges, but they are brought over to the sheriff's department where it's guaranteed and it's put into the computer, and that's where they are fingerprinted.

Q. And photographed?

A. And photographed. Normally the officer doesn't look at it, because they know it goes to the sheriff's side anyway.

Q Are you saying that you can come in there for a Title 39 or a murder, whatever it is, you go through the same process?

Appendix U

[14]

A. Yes, go through the same process.

Q. And they are not segregated by charges?

A. No, we treat everyone the same.

Q. And they are not segregated by indictable or non-indictable?

A. Yes.

Q. They are not, correct?

A. Yeah, they are not segregated.

Q. So everyone is treated exactly the same at processing?

A. Yes.

Q. Then they get their fingerprints and their papers.

After they are fingerprinted, do they move to another area?

A. A holding cell.

Q. Is it a holding cell or a TV waiting room?

A. No, that's a holding cell. That's the second part. That's just before they come back over to us.

Q. And that's in an Essex County holding cell, correct?

A. Yes.

Q. How many people, max, could be in there?

A. You could probably hold up to maybe thirty * *

* * *

[16:9]

Q. When does a person come under reasonable suspicion of contraband en .veapon – in your facility at the processing stage?

A. The processing stage, to this point, well, if the metal detector goes off, is that what gives us reasonable suspicion that he might be carrying a knife or something else that's a metal object, the contraband, meaning drugs or anything?

Q. Yeah, like coke?

A. At this point, you wouldn't really know, because it wouldn't go off and he still has his clothes on at this point.

Q. Would the charges give you reasonable suspicion?

A. No, not really, because, like I said, we treat everybody equal.

Q. Even traffic offenses?

[17]

A. Everybody is treated the same.

Q. So they are in that holding cell and what is the next step?

A. From there we go to the other side to the sheriff's department, grab their folders. We bring the folders back over and then we have one officer at a computer and he is putting the charges into the computer, and then there's another officer that is doing the property that's brought over. That's their personal stuff, cell phones, wallets, currency and then there is another officer that does cell assignments. He comes over. He is asked questions about his medical, yes, no answers.

Q. He being the arrestee?

A. Yeah. He would go over there and then he would go over to the next officer. They would do his property, put everything in the computer while it's in front of him. He would sign for it, make sure everything was there and that nothing was taken.

Appendix U

Q. Now, he is out of the holding cell?

A. Yes, he is in the intake area.

Q. Is this done one at a time?

A. There's a group of guys come in, but each one is done one at a time.

Q. When he takes his wallet out, he puts it [18] in a bin or something or plastic bag?

A. Wallet goes in a yellow plastic bag with all his other personal stuff.

Q. And while they are doing that, are they taking a report of what property they are taking?

A. Yes, everything is logged.

Q. Then what happens?

A. With his personal property?

Q. Well, with the inmate after the personal property is –

A. After the personal property, after that, he would go to get his cell assignment, they would get his information, that's from medical, too, and then from there he goes to the shower area.

Appendix U

Q. So how long does that process take from the holding cell? I'm trying to find out where the TV's are.

A. Once they come into the intake area, there's TV's for the inmates.

Q. Is that like a waiting room?

A. Yes.

Q. How many can sit there at a time about?

A. Well, you could put more in there, but we don't for security reasons. We might do maybe ten, ten at a time.

[19]

Q. So ten at a time can be in that waiting room sitting?

A. Uh-huh.

Q. At any point in that waiting room, are they patted down or searched?

A. No.

Q. But they still have their street clothes on?

A. They have their clothes on still.

Q. From the TV waiting room, what are they waiting for?

A. We would get their paperwork and call them up and go to each station.

Q. What's a station? You mean a shower stall?

A. No, they would go to the officer for the property, then the cells and then the medical questions.

Q. How many stations are there?

A. There's usually three.

Q. Now, three at a time could be processed; is that correct?

A. Yes.

Q. And then once they are processed at each station, where are they told to go?

[20]

A. From there they go to the shower area.

Q. And the shower area, are there officers waiting in there as well?

A. We usually have officers in there.

Q. Could it be two?

A. It could be two, depending on our schedule that night.

Q. In that shower area, is there a desk where the officers can sit by and take notes?

A. I mean, there's like counter space, but there is really no desk. It's one counter that goes all the way around the intake area.

Q. So if I'm the arrestee walking into the shower area, I'm going to see in front of me maybe five feet ahead a counter area; is that correct?

A. Yeah, it's about five feet or so.

Q. So five feet there's a counter and behind that counter would there be the office?

A. That would be where the officers are.

* * *

[21:3]

Q. Does the officer always stay behind the counter because the inmates are walking in?

A. Yeah, he stays up by the counter, because he wants to make sure that no one comes into our area.

Q. Is there, like, a glass or anything on that counter?

A. No, it's an open counter.

Q. When you said up by the counter, is he behind the counter?

A. No, he is up by the counter or behind the counter. He could be standing even with the counter.

Q. How many come in at a time into that area?

A. That would be three.

Q. No more than three?

A. Just three, that's all the stalls we have.

Q. And that was as well three stalls on March 9th of 2005?

A. Yes.

Q. And these stalls don't have shower curtains; is that correct?

A. There's no shower curtains, I believe.

Q. So when there's three at a time lined up, [22] do they go – what are the exact directions?

Appendix U

A. The inmates come in, the officer tells them – there are bins. We have for them. They have a jumper, their care packages. They have them on the chair in front of each shower area. Then they have gray bins that are in front that the inmate their belongings. This is where the clothes go in. This is where the search begins of the contraband. So while the inmate is in the shower –

Q. Well, the search for contraband or weapons?

A. Anything at that point.

Q. So this is the search procedure now?

A. Yes.

Q. So they are standing in front of their – like a stool?

A. Well, there's a stool. We have the jumper that they would be getting into, their care package. We keep everything all separated. In front of them there is a gray bin. He puts his clothes into the bin.

Q. How does he know that?

A. The officer tells him, put your clothes into the bin.

Q. Does he say, take all your clothes off?

[23]

A. Take off your clothes, shoes into the bin.

Q. Are they standing there naked?

A. They are standing there naked.

Q. Do they all take their clothes off at the same time?

A. They usually do it at the same time.

Q. They take all their clothes off and they put their clothes into the gray bin, because they are directed by an officer to do that; is that correct?

A. Yes.

Q. And then you said this is when the search begins. Are they told to turn around so you could see –

A. No, at this point the inmate is already in the shower.

Q. I'm talking about when they are standing.

A. They are already in the shower and what happens is the officer grabs the gray bins.

MR. RUDDY: He didn't say there was a search.

MS. LASK: He did say this is when the search begins.

MR. RUDDY: He said the search of the clothes.

THE WITNESS: The clothes.

[24]

Q. The gray bins is about searching the clothes?

A. They go into the bins.

MS. LASK: Could you go back and read where he said search? He said this is where the search begins, because he didn't say clothes.

THE WITNESS: Well, you didn't let me finish. You were me about the processing.

MS. LASK: Okay, we will go on.

Q. When they are standing there naked, does the officer make sure they take off their clothes and go put it in the bin and –

A. Right, they step right into the shower. They don't stand there naked.

Q. Stop, let me ask the question.

A. Sorry.

Q. So they put the clothes in the bin because the officer directed them.

I'm asking you, procedurally, is it best that the officer makes sure that everyone takes off their clothes at the same time?

A. Well, yeah, of course, because he wants to make sure everything is in the bin.

[25]

Q. So now they are standing there and how do they know to go and take a shower?

What's the next word from the officer's mouth that should be coming from him?

A. Just tell them go in and take a shower.

Q. When they are standing there, I guess they are arm's length the three of them?

A. Maybe a little bit more. Maybe two, three feet apart.

Q. Standing there?

A. Yeah.

Q. So if I was in the middle, I could look to the right and see the other guy or I could look to the left

and see the other guy because they are standing; is that correct?

A. Yes.

Q. And, of course, the officers can see them all completely naked as they are standing there?

A. Well, there's a door that's there.

Q. No, the officer that's there by the desk?

A. No, but he is not right on top of the inmates.

Q. He is about five feet and he could visually see them?

A. Yes.

Q. Now, my question is, while they are [26] standing there, at what point does somebody check them for drugs or contraband before they go –

A. That's it. They are not checked.

Q. They are not checked for drugs or contraband?

A. Just their clothes are, because they are in the shower.

Q. So then they go in the shower and there's no curtain, they are open stalls?

A. Okay, yes.

Q. And then they all walk out at the same time, because I'm just thinking do you want one at a time to walk out or do you want all three of them to come out?

MR. RUDDY: Object to the form.

Q. How do they all come out of the showers? How are they directed?

MR. RUDDY: This is like three different questions. Are you talking about what happens or what the procedure is?

Q. When they walk out of the shower –

THE WITNESS: Can I answer?

MR. RUDDY: If you understand the question.

Q. Do they all walk out at the same time or [27] one at a time?

A. No, when they come out, they come out whenever they are done and they come out and get dressed.

Q. Well, what I want to know is, the officer is standing there, so I'm thinking for security reasons he must be watching them the whole time. That's my question.

A. Well, at that time he is going through everybody's bins, the clothes, and then he puts it in a property bag.

Q. At the time they are in the showers?

A. At the time they are in the showers, yes.

Q. Do they come out on their own when they feel like it or does an officer say, okay, come out now?

A. No, they come out on their own.

Q. When they come out on their own and arrestee number one comes out first, is he told to wait until the other two are done?

A. No, he just gets dressed.

Q. And say the other two are still in the shower while he is getting dressed, does he leave? Is he escorted out or that one officer is responsible for escorting all three of them out?

A. Right in there they could walk right into the [28] sitting area.

Q. On their own?

A. Yeah, walk right through.

Q. So is it your policy, then, if it happens, one person could get done with their shower, put on their clothes and walk on by to the other room without being escorted?

A. Yes, because the room is maybe ten feet away.

Q. How do they know to go to that other room?

A. The officer tells them.

Q. When does he tell them that?

A. When they come out of the shower and they are dressed. He says go to the other room.

Q. So he would have to be waiting there to make sure they come out of that shower, correct?

A. Correct.

Q. When they come out of the shower, they are putting on their orange jump suit?

A. Yes.

Q. Now they are dressing while the officer is there and also sometimes the other inmates could be out of the shower as well dressing?

A. Yes.

Q. They could all be dressing at the same [29] time?

A. Basically, yes.

Q. Have you ever performed a strip search on an inmate in your career?

A. No.

Q. Never?

A. No.

Q. Have you ever authorized a strip search?

A. Never.

Q. Have you ever filled out strip search forms for the county?

A. Never.

Q. Do you know any officer that's ever performed a strip search In Essex County?

A. Not to my knowledge.

Q. Can you give me the definition of a strip search?

Appendix U

A. Strip search is when they ask an inmate to bend over, like a cavity search, if there's reasonable suspicion that the inmate might be carrying something or has something on him, at that point, if he comes back from a visitation.

* * *

[30:14]

Q. Can a corrections officer perform a search or must they always have a sergeant okay the strip sergeant?

A. Yeah, it would have to be authorized.

Q. If a person takes off all of their clothes, are they naked?

A. Yes.

* * *

[30:23]

Q. If a person is directed to take off all of their clothes, are they being directed to strip?

A. No, the reason they are taking their clothes [31] off is so they could take a shower.

Q. What is your definition of the word strip, as you know it?

Appendix U

A. Take off your clothes, you know.

Q. Take off your clothes. So if you direct me to take off all my clothes right now, you would be directing me to strip; is that correct?

* * *

[31:2]

Q. My question is, if you direct me to take [32] off all my clothes, are you directing me to strip?

* * *

[32:4]

A. Yeah, if there was reasonable suspicion, yeah, I'd have to.

Q. No, the question is – forgetting reasonable suspicion. I'm just trying to figure out what the difference between strip naked and keeping your clothes on is to you.

If you direct Alan Ruddy in this room to strip – I'm sorry, to take off all his clothes, is that a strip?

A. Yeah.

MR. RUDDY: Object to the form. You can answer.

Q. You said yes. And if Alan Ruddy was standing there naked, when does that become a search?

A. Well, when we actually take him and we do search him.

Q. What's the process of searching?

MR. RUDDY: Object to the form. You can answer.

Q. What is a search? Tell me what a search is?

A search is when you do a body cavity search, [33] you know, coming back from visits, like I said, if you have reasonable suspicion that the person is carrying contraband on them.

Q. So when all those people, the three people are standing naked and somebody is visually looking at them, the officer or two that happen to be in that room, are they –

MR. RUDDY: I'm going to object. There's no foundation that an officer is looking at all three of them.

MS. LASK: At one point he said that the officer could see one or all three, but he sees them naked.

A. He is not staring at them.

Q. But he can look at them, right? He does see them or does he cover his eyes and say I'm not going to look?

A. That's up to the officer.

Q. Is it the procedure for the officer to cover their eyes when they strip naked?

A. No.

Q. Is it a policy of your jail to keep their eyes on them because they are obviously in there for a crime and so they are supposed to be watched by the officers; is that correct?

[34]

A. Of course, they have to watch to deter any problems that might happen or occur.

Q. Even while they are naked, of course; is that correct?

A. Yes.

Q. And everybody gets treated the same? Nobody gets treated differently at your prison?

A. No.

Appendix U

Q. So there is no discrimination against a person who comes in for a traffic violation, which is Title 39, or a person that comes in for a murder; is that correct?

A. Correct.

Q. Everybody is told to go naked?

A. Everybody has the same does the same process that everybody else does.

* * *

[40:6]

Q It's your job to authorize a strip search?

A. No, we don't do strip searches. The only time we ever see them Is when they are taking a shower.

MR. RUDDY: He already testified to that

Q. If there was a strip search, you would authorize it, you would be the person that would authorize it?

A. I would have to talk to my lieutenant and it would have to come from the higher-ups.

* * *

Appendix U

[41:5]

Q. Would a person be strip searched for a traffic violation?

A. Is he being detained?

Q. If they come in through processing, would they be strip searched?

A. Like I said, we don't strip search. They come in and they are processed just like every inmate that comes into our facility. That's the processing.

Q. If a person was strip searched, would there be a form filled out that would be in their file?

A. Yeah, that's a form that has to be filled out. That's from either the lieutenant or —

Q. Do you ever want to look for identifying marks or, you know, like tattoos or needle marks or anything of these people that come into processing to make sure —

A. No.

Q. Let me finish. Do you try to insure, you know, look for gang member tattoos when they are naked? [42] Do you try and look for that?

A. Like I said, I'm not there at that time.

Q. Who is there?

A. Whoever the officer is at that time, and that's his prerogative.

Q. Is there any kind of training that they should – is there a procedure and policy that they should be looking for tattoos, identifying marks, needle marks?

A. Usually when they are inside, once they are inside the facility, if you see it on their hands or stuff like that or if there is a situation where the inmate gets in trouble –

Q. Oh, no, I don't care once they are an inmate. I'm talking about processing.

A. Oh, no, no, not to my knowledge.

Q. Is there a policy and procedure for the officers to look for identifying marks, scars, tattoos on these people being processed so that when you do put them in the population you hopefully know that they are not a gang member that is going to result in some violence or they don't have some kind of disease?

A. That's usually taken care by medical once they reach the quarantine area.

[43]

Q. When do they reach the quarantine area?

Appendix U

A. That's after processing.

Q. What does medical do, have them strip again?

A. I have no idea. I'm not in that area.

Q. Are the medical people officers?

A. No, medical staff.

* * * *

APPENDIX V — EXCERPTS OF EXAMINATION BEFORE TRIAL OF LARRY GLOVER, DATED FEBRUARY 13, 2007

OFFICE OF THE COUNTY COUNSEL
HALL OF RECORDS, Room 535
Newark, New Jersey 07102
February 13, 2007
2:25 p.m.

EXAMINATION BEFORE TRIAL
OF LARRY GLOVER

* * *

[10:13]

Q. Warden, how long have you been working at Essex County prison facility?

A. Since July 2004.

Q. Where were you before that?

A. New Jersey Department of Corrections.

Q. When did you graduate from the police academy?

A. Approximately 1979, 1980.

Q. In all of your years from the police academy to now, have you conducted any strip searches in your career?

A. Absolutely.

Q. Could you tell me what the definition of [11] a strip search is, please?

A. The definition of a strip search is the removal and inspection of the naked body of an individual for the purpose of discovering contraband.

Q. Did you say the removal of?

A. The removal of clothing of an individual for the purpose of and inspection of detecting contraband.

Q. And contraband, would that be drugs or weapons?

A. Drugs, weapons, anything that's not permitted inside a correctional facility.

* * *

[22:22]

Q. Would you be able to tell me what language has been changed from July of '04 to December of '04 with respect to search policies, the intake search policies?

A. I would venture to say from the time I arrived in July '04 until the present, the search criteria has [sic] not changed. There have been some additions to the policy with the introduction of the body orifice scanning system, but basically the search policy has not changed.

Q. What is the search policy, then? Can you tell me?

* * *

[23:11]

Q. Tell me what the search policy that has not changed that you just spoke of?

A. That persons entering the Essex County Correctional Facility will be thoroughly searched before permitting them access to the secure perimeter of the institution.

Q. The secure perimeter would be the inmate population?

A. Yes.

Q. So how are they thoroughly searched? What is the procedure?

A. Inmates entering Essex County Correctional Facility will walk through a metal detector currently. From that point after proceeding through the walk-through metal detector, they will be placed [24] in the BOSS chair. From the BOSS chair, they would stand up and place their chin on the headrest portion of the BOSS chair. From that area, they would leave the pre-booking are of intake and go into the intake area.

At that point, they would be interviewed by the officers at the desk and their charges would be entered into the system. They would be searched to insure that there is no contraband on their persons or in their property.

Q. I'm just going to stop. How are they searched? Like I see here in directive 04-06, conduct a thorough search of individual inmates, that says the booking area security officer shall do it.

How do they thoroughly search the inmate?

A. The inmates remove their clothing in the area near the shower. The officer searches their clothes. Those things that are permitted for them to have are given back to them or placed in a plastic bin. The inmates shower and they are then permitted to put those clothes back on, and then they are given a jumpsuit. Their clothing is, at that point, searched and all contraband seized from their clothing is entered into the property room.

Q. When they are in that shower room, how [25] many come in at a time?

A. There's approximately five shower stalls. We use approximately three. They are divided by a concrete wall with an opening in the front section, so as many as three individuals can be in the shower area divided by the wall.

Q. Well, the wall is when they go in the shower stall; is that correct?

A. Yes.

Q. The shower stalls have divisions?

A. Yes.

Q. Before they enter the shower stall, are they standing in front of the shower stall and putting their clothes in the gray bins on the chair?

A. Yes.

Q. When they take off all their clothes in the gray bins, do they go into the shower stall and take a shower?

A. Yes.

Q. While they are putting their clothes in the gray bin, how many officers are in that shower area room?

A. One.

Q. Could there be more than one?

A. Could there conceivably? There can [26] conceivably be as many as five or six, but it's not likely.

Q. You mean people coming in and out or there would be a reason to have five or six, because of the amount of inmates?

I mean, what would the reason be for five or six?

A. There are five or six people assigned to the area.

Q. In that shower are?

A. No, there are five or six people assigned to the intake area. They could conceivably be anywhere in the intake area, not likely, but they could conceivably be there. There is no physical barrier that prevents them from being there.

* * *

[27:1]

Q. So from this process, I heard that they go to the sheriff's department to get fingerprinted and photographed?

A. Absolutely.

Q. After that I heard that they go to a waiting area there where there is TV?

A. After they are processed by the sheriff, they go into another holding cell on the pre-book side of intake. At that point, you are not in the correctional facility, per se, you are outside. You are in the processing area.

Q. So after that cell —

A. Then you are brought across the hall, through a door, through actually two doors into the intake area and placed in a waiting area where you are permitted to make your phone call.

Q. And that's where the TV's are as well?

A. Yes.

Q. So then right from that TV area where they can make a phone call, they could go right into the shower room?

A. No, there's another waiting area on the other side.

Q. I never heard of this one. Go ahead. So there's another waiting are? [28]

A. Absolutely.

Q. Does that have TV's?

A. Absolutely.

Q. So then they wait there as well?

A. They move from the area – inmates are permitted to get a ten-minute free phone call. Once the inmates make their ten-minute free phone call, they are

directed by the officer at the desk to move over to another waiting area where they are processed into the jail. From that waiting area, they are in close proximity to the shower area.

Q. When you say close proximity, is that the next doorway they could possibly go through?

A. Yes.

Q. So how many people are in that waiting area in close proximity to the shower are?

Is that a room where ten or twelve people can wait?

A. The room next to the shower area, you could conceivably get twenty people there.

Q. Are there usually – have twenty people been in there?

A. On occasion, yes.

Q. And every time they go into the shower area, is it a doorway they go through, like, a [29] doorway?

A. Yes.

Q. And to the right of them would be the five stalls?

A. To the left of them.

Q. To the left of them are five stalls, three are the stalls that are working; is that correct?

A. To the left of them are five stalls, three of them which are used. All five of them are working.

Q. Has there ever been a time where all five of them were used?

A. We have not had – found it necessary to use all five at the same time.

Q. Why aren't the other two used?

A. We do not need to use the other two stalls.

Q. Meaning you only take a maximum of three people at a time?

A. Yes.

Q. Once they are standing, they come in and they stand in front of their particular stall – I guess they are directed to stand in front of a stall; would that be correct?

A. No, individuals who are searched individually, you come in, and they bring them down to the stall [30] area where he is going to search them. The shower area, the stall, is extended, so it's not just the shower, it's

extended beyond the shower. So you could conceivably be in the area by the shower and not be in the shower. So there is a barrier that gives you separation between individuals.

We have limited staffing. It's not conceivable to process five individuals with one officer. You process one, put him in the shower, and then you move down and process the next individual.

Q. So all three are there, one takes his clothes off, puts them in the gray bin, takes a shower, and then the officer moves to the second one?

A. You process individuals individually. You do the first guy. You go back and get the second guy. You put him in his area in front of the shower. You process him. You take his clothing and then you separate the clothing that he can have from the clothing he can't. You move down and get another guy.

* * *

[32:7]

Q: Number 8, it says inmates may be subjected to a strip search or body cavity search in accordance with 10A.

When may they be subjected to a strip search?

A. When there's evidence that they contain contraband that we did not otherwise detect.

Q: Is that a reasonable suspicion standard? Is that what we are talking about right now?

A. Pretty much.

Q: How would there be evidence that they have contraband if they went through that BOSS chair, the metal detector?

A. If they went through the BOSS chair and the BOSS chair did not clear, because it indicated there was something up a body orifice that was not detected, then we would place them in and in an isolation cell and go through the process of having them strip searched.

[33]

Q. What does a strip search entail? What is the process?

A. Removing the individual's clothing, observing them as they remove their clothing, having them bend over, spread their cheeks to determine whether there is some foreign object placed in their rectum.

Q. Do they have to squat and cough to make sure it falls out?

A. No.

Q. Anything past the spreading of the cheeks?

A. Requires medical.

Q. I meant as far as the search process?

A. No.

Q. So it ends there?

A. Yes.

Q. Is that the same procedure that was happening the year before this?

A. The year before?

Q. 2006? I'm assuming you are talking about in the present.

A. Is that the same procedure that we would have utilized in 2005 and 2004 since I arrived?

Q. Yes.

A. Yes.

[34]

MR. RUDDY: Except for the chair.

MS. LASK: The chair is new.

Q. The chair is this year.

A. They would go through a walk-through metal detector, and if they couldn't clear the metal detector – basically, the BOSS chair is a deep scanning device. The metal detector does the same thing. The BOSS chair just happens to be more thorough. It can pinpoint an object more accurately.

Q. Is marijuana, cocaine, any illegal drugs allowed in the prison?

A. No, it's not.

Q. So the BOSS chair would not or the metal detector would not pick that up?

A. No, it would not.

Q. How would you check those people that are coming in for, say, a drug charge, their intake is a drug charge and they might have marijuana or coke or something stashed?

A. Any individual entering the Essex County Correctional Facility enters under the jurisdiction of a municipal agency or state police or any other law enforcement agency. They are required to be searched prior to bringing them to the jail. If they arrive at intake, the pre-booking area, one of the [35] things that we do in the pre-booking area is search their persons.

Appendix V

Inmates are required to empty their pockets, take out everything that they might have in their pockets or outer garments. If they are found to contain contraband of any sort, a weapon, drugs, we refuse to accept the prisoner and we send him back with the jurisdiction that arrested him.

Q. But what if – when they come to your facility on a charge of, say, menacing with a dangerous weapon, they come into intake?

A. They come into pre-booking.

Q. Is it correct to say that you have a right to strip search inmates – I mean, arrestees coming into your pre-booking and your booking process if you have a reasonable suspicion that they might have drugs or contraband; is that the correct procedure?

A. No. As long as they meet the elements of the codes, we have a right to strip search anyone entering the facility, as long as it does not violate the code.

* * *

[40:2]

Q. Now, I'm just talking about processed people, not an inmate that's been in there after processing, but it could happen that those processed persons would have a strip search form filled out if they were strip searched; is that correct?

A. I haven't seen a strip search form since I arrived at Essex County Correctional Facility.

Q. You have never seen a filled out one?

A. No, I haven't.

Q. Is it your duty to see them?

A. No.

Q. You just haven't seen them?

A. Right.

* * *

[41:9]

Q. Can a corrections officer conduct a strip search without a supervisor's authorization?

A. No, not in Essex County Correctional Facility.

* * *

[69:3]

Q. Now, to go back to a question, when you came on as warden in 2004, did you find any major difference in the strip search policies at that time from the strip search

policies that had been instituted, except for the BOSS chair that had been instituted since that time?

A. There were no significant changes made to the policy at Essex when I came on in 2004.

Q. So as far as you know, the strip search policy from March 2003 until today is significantly similar except for the BOSS chair?

A. I can testify that the policy that was in existence when I came had not been significantly modified, but I can't tell you what policy was in place in 2003.

Q. So the basic elements of the strip search policy that existed before you came are in place today?

A. Yes.

Q. Now, Warden, you've had occasion to be at many different institutions in the State of New Jersey, correct?

A. Yes.

[70]

Q. And would you say that the potential inmate that comes to the Essex County jail poses a danger to other inmates and to corrections officers?

A. The inmates housed in Essex County jail tend to be more violent than inmates held in other county jails. It's a large urban area, and as such, you have a great deal of violent crime and drug-related offenses that you would not find in suburban county jails.

Q. Would you say that the overwhelming majority of inmates in the Essex County jail are of this dangerous quality that you just mentioned?

A. Absolutely.

Q. When you articulated the strip search policy with regards to Essex County jail, is the strip search policy instituted to find contraband or to protect the Essex County jail from dangerous activities?

A. The search policy at Essex County Correctional Facility is designed to prevent the introduction of contraband into the institution via – be it cell phones, drugs, weapons. That's the purpose of all searches in the county jail.

* * *

[72:2]

Q. After they inspect the jail, you indicated that sometimes you have to make revisions to certain policies?

A. Yes.

Q. Do you remember if any of your policies, since you have been warden, had to be revised concerning strip searches?

A. Yes.

Q. Do you remember what they were?

A. There are changes in the language of the code, and as they revise the codes, we were required to revise the policy. That's why the 04-06 strip search policy was revised again. I can't tell you whether it was before or after, but there is certain language that they required us to put in the policy.

Q. Do you remember whether this language substantially changed the strip search policy?

A. The language did not significantly change the policy, but it was a policy requirement.

Q. So in other words, the state, by their inspections, insure that the strip search policy of the State of New Jersey is followed by the county institutions?

A. The state, by their inspections, insure that [73] policies of all county jails is compliant with chapter 31 of 10A, because as you are aware, there is a different policy for state correctional facilities.

Q. So we are only talking about the county?

A. Chapter 31.

Q. Now, this review by the state, could you tell me what form it takes, you know, what this inspection process consists of?

A. The entire inspection process or the inspection process of the documentation?

Q. We are talking about strip search.

A. All written policies of county jails are required to be submitted to the inspection team upon their arrival. They review all of the institution's policies and sometimes they actually have you send those policies to them in advance so they have more time to review those policies. When they arrive, they tell you whether your policies are in compliance with the code. If they are not in compliance, during the process of the inspection, they will tell you what revisions need to be made to the policy so that you are in compliance by the end of the inspection period.

Q. Now, in addition to the language, do they also inspect the procedures?

[74]

A. As they tour the facility, they insure that the actions are consistent with the policy, so they would go to the intake area, they would go to the control center, they would go to the hospital, they would go to all areas

of the institution to insure that the policy, not just a paper policy, but in fact, it is a working policy.

Q. Do you know, since you have been the warden, that there's been any criticism of the actual ongoing field procedures at the Essex County jail in terms of strip search or intake?

A. No.

Q. Now, after the inspector comes, do they issue a report to you?

A. Yes, they do.

Q. Now, you have vast experience beyond the Essex County jail from your other prior history.

Is it your understanding that before you were the warden in 2004, and our case only goes back to 2003, let's say it's from 2003 on, that this same procedure of state inspection was instituted at all county facilities in the state?

A. Yes, it is. Yes, it has been.

Q. As far as you know, was there any critique of the strip search policies of the Essex [75] County jail in the state inspections prior to your tenure from March 2003 onwards?

A. The county inspection team is required

to inspect all policies in all county jails at least once per year and make recommendations for revision. They made recommendation for revision in most of the policies at Essex County Correctional Facility and Essex is approximately ninety-six percent compliance [sic] with the county inspection team.

* * * *

APPENDIX W — EXCERPTS OF DEPOSITION OF RAYMOND J. SABBATINE, DATED DECEMBER 10, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DOCKET NO. 07-CV-73

JENNIFER COLLINS

PLAINTIFF

VS.

DANIEL DAVEY, ET AL.

DEFENDANTS

DEPONENT: RAYMOND J. SABBATINE

DATE: DECEMBER 10, 2007

REPORTER: PATRICIA SECKLEY

* * *

[76]

Q. Okay. Now, what is it that makes you believe that it was proper to strip-search Jennifer Collins at the Knox County Jail on January 16th, 2006 because she [77] self-reported?

A. Any time you have a - a planned reporting to a correctional environment, I believe that the person at that point can secret contraband on their body; whereas I believe that a person that is freshly arrested wouldn't have the same opportunity, even though they could, to plan a contraband on the body so that it's less likely to be found, just like a person out on work release that comes back in every day, just like a person that has made bond but then gets sent back to the jail because of a bond revocation, any time you're out in public and have exposure to the public and then come back into custody and especially if it's a situation where you have time to plan your surrender into custody.

Q. Okay. Does that mean that any time an individual self-reports, that individual should be subjected to a strip search?

A. 1 think at that point it gives one reason to believe that the person is more likely to be in possession of a contraband than they would if they were just arrested off the street.

* * *

[83]

Q. All right. Thank you. Is it your opinion that every individual taken into custody, and by that I mean arrested, is strip-searched?

A. I don't believe that -- first of all, I think that -- that we shouldn't be bringing certain people into custody, and that would kind of eliminate the problem. But from a risk management standpoint, I would say no. But from a jail administrator [84] standpoint, I think I would probably opine as it would be the most effective way of keeping contraband out of the jail.

Q. All right. Isn't it true to say that contraband gets into the jails even though arrestees are strip-searched?

A. You're absolutely correct about that. The-- the issue would be that there have been some jails that I'm aware of that have gone because of litigation to the point of the not strip-searching anybody until after arraignment. And -- and the incidence of -- of problems have increased significantly. And even if it's only one in-custody death that results from not requiring a strip search of somebody that legally would have been stripable, then you have a -- an 8th Amendment issue on the duty to protect because now they've either brought in a weapon that they've hurt somebody else, they've brought in an instrument of suicide and have suicided, or the drugs that they have muled in are in somebody else's hands and now somebody has overdosed.

Q. Uh-huh.

A. And I've had cases like that, and that's what makes it so difficult for jail administrators is that, you know, we have two constitutional duties that we're [85] trying to balance. And the most effective way from a jail administrator

standpoint is to strip-search everybody that --that comes in the jail. And from a parent standpoint, you know, I may not like that. And from a risk management standpoint, I also, you know, would not recommend that. But we are in a dilemma, and -- and as we erode our ability to search, we then have a greater exposure on the duty to protect side.

Q. I understand.

A. And that's becoming very difficult for jail administrators. We feel like ping pong balls.

Q. But, sir, don't - do you agree that requiring reasonable suspicion or articulable suspicion or whatever the term is to strip-search, for instance, a misdemeaneant arrestee balances institutional security with the needs for individual privacy?

A. Well, I think given the current case law, again, from a risk management standpoint, it is attempting to do that. I'm not so sure from a correctional consulting and a former administrator standpoint that we're accomplishing that. And that's because I'm -- you know, the leading cause of death in our Kentucky jails right now bas gone from suicide to overdose. And -- and we're seeing more and more drugs getting into the jail. And -- and, you know, then we [86] have to answer on the other side to, why are they getting in our facility. Again, we're in a difficult -- we're in a dilemma right at this point. I wish there was, you know, greater clarity for us to follow. At least then we'd have greater protection on the failure to protect side if we should not strip-search another group of individuals

that the courts have determined are not stripable. Clarity would be good. And I guess that's what -- the reason for the expert, you know, opinion on this is, is that we're -- we're as confused as everybody else is about this.

* * *

[89]

Q. Is it your opinion that the -- the law should not distinguish between categories offenses with regards to strip searches?

A. Well, I think the courts in their wisdom have have tried to use some risk management tool to help us, because, you know, we're requiring $7-an-hour employees to try to determine reasonable belief. And we have to provide them with some guidelines. And it's just like classification risk management. You know, we try to separate violent felony offenders from nonviolent felony offenders. But there's no guarantee [90] that a nonviolent offender who has been put under pressure is not going to victimize somebody because they feel that they're protecting themselves. So I think we use the best tools possible and I think the offense is a reasonable tool at this point because there's nothing else from which we can hang our hat on. But I really don't think. that - that there is as much validity to that. And - and the problem is, is we haven't demonstrated it one way or the other. I'm one of the very few jails that have a sophisticated enough database where those runs can take place. Most of the time when you go to these jails and you start talking about these problems, you get nothing but

anecdotal stories as to what and what isn't. And we tend to remember those that are most pertinent to us and we kind of forget those that don't meet our paradigm. So it's difficult to really know the true state of things. But if you look at that - that run, it kind of indicates that there's a greater -- there is a great -- presence of contraband amongst those individuals that have minor offenses.

* * * *

APPENDIX X — AFFIDAVIT OF RAYMOND J. SABBATINE, DATED MARCH 28, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JENNIFER COLLINS,

Plaintiff

vs.

KNOX COUNTY, DANIEL DAVEY, HELEN MYLAN, OFFICER REED, and SHARON HILKER,

Defendants

AFFIDAVIT OF RAYMOND J. SABBATINE

NOW COMES Raymond J. Sabbatine who says and deposes as follows:

1. My name is Raymond J. Sabbatine. I am knowledgeable and experienced in the area of correctional facility security. My curriculum vitae outlining my experience is attached to the Defendants' Statement of Uncontested Material Facts, and incorporated into this affidavit by reference.

2. In connection with this case I provided an expert witness designation. That designation contains a list of the materials that I have reviewed and/or consulted in forming my opinions, and it also states my opinions and

the grounds for my opinion. The designation is attached to the Defendants' Statement of Uncontested Material Facts and is also incorporated into this affidavit by reference.

3. When an inmate is admitted to a correctional facility through a process commonly referred to as "intake," there is a significant risk that contraband may be brought into the facility by an inmate.

4. The process of admitting a new inmate to a correctional facility requires a concerted effort to prevent the introduction of contraband into the facility.

5. I reviewed data from the Lexington-Fayette Urban County Detention Center (Kentucky). The data covered a twelve month period, and revealed that numerous individuals were charged with either traffic infractions or minor offenses not associated with drugs or violence were found to be in the possession of contraband and brought into the correctional facility. [*2]

6. All of the facts contained in this affidavit, including the documents incorporated herein, are based on my personal knowledge.

Dated: 3/28/2008

[Signature]
Raymond J. Sabbatine

STATE OF KENTUCKY

_____, ss.

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Personally appeared the above-named Raymond J. Sabbatine on this 28 day of March, 2008, and made oath that the foregoing statements by him subscribed are true and based on his own personal knowledge.

Before me,
[Signature illegible]
Notary Public/Attorney at Law

APPENDIX Y — EXCERPT OF TRANSCRIPT OF HEARING, DATED JULY 22, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NUMBER: 05-cv-3619

Request for Extention of Time.

ALBERT W. FLORENCE,

Plaintiff,

-vs-

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Defendants.

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101

July 22, 2008

BEFORE: THE HONORABLE
JOSEPH H. RODRIQUEZ
UNITED STATES DISTRICT JUDGE

* * *

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[14]

* * *

THE COURT: Well, what do you represent will be demonstrated in this additional information that you are gathering?

MR. DI DONATO: Judge, I'd be happy to do that because, again, Ms. Lask is incorrect. These sheets are not simply a page that has a checked off strip searched or not strip-searched. These sheets identify what was found during the course of -- whether you want to call it a strip search or a visual observation, what was identified.

Judge, one of the arguments that we will offer in support of both our opposition and our cross-motion for summary judgment is that the policy of the county jail to do a visual observation of everyone admitted is critical in the State of New Jersey as gang violence takes over the correctional facilities, and one of the only ways to identify gang members, which is necessary for classification and [15] housing assignments, is to do a visual observation to see tattoos that are on their body.

Your Honor, I have research that fills reams to show that gangs are taking over even the most rural of New Jersey counties as we speak. If you told me ten years ago that there would be Bloods and Crips and Latin Kings in Burlington County and Mount Holly, I would have laughed. But, it's reality and these guys don't admit who they are. And if you put a Blood and a Crip in the same cell, the

next morning one of them is going to be dead. That's a reality in the correctional world. It's well documented in the literature. And the fact is that the only way you'll know, because these guys don't admit gang affiliation, is to make them strip, take a visual observation of them, and see if they have gang tattoos. Now, they won't all have them, Judge, but I can tell you from reviewing even a fraction of the documents that we received that we've already turned up instances even where they have "MOB," which means either one of two things, Member of Bloods, or if it's joined with a Crip tattoo means Murderer of Bloods. This is critical information for correctional facilities to have and it's the only way they can get it. And what *Bell v. Wolfish* said is that strip-searches are not always unconstitutional, but you have to weigh the need for institutional security versus the individual right to a no invasion of their personal privacy.

[16]

THE COURT: Well, aren't you essentially raising a legal argument?

MR. DI DONATO: We are, Judge. But, what we want is we want a chance to go through these documents, search them to make the argument, to prove based on facts that are contained in these that this is a real situation. Because, I expect as soon as we make the argument, counsel will say, well, this doesn't happen or that doesn't happen or not often would it happen and what's the realistic import to institutional security. And certainly, if I can point your Honor's attention to the fact that there were, you know,

five or ten or a hundred gang members identified through these, it has some more import.

And, your Honor, I can tell you that I argued an identical motion that is currently before the court on a Burlington County strip search policy that was more intrusive than currently in place, one that involved bending and squatting and coughing before Judge Brown in the district court in Trenton about ten years ago and the judge granted my motion saying that the policy and the procedure was institutionally correct and it was constitutionally permissible. And the basis for that was that reams of documents that I produced to the court on the motion showed that even non-indictable offenders were constantly being caught bringing dangerous drug and violent paraphernalia into [17] the jail and the only way to find it was to strip search them and make them bend, squat and cough. So, this is through my personal experience with this policy and the district court that the information is absolutely relevant. It's going to be produced within the applicable period of discovery as set by the magistrate, and we only ask enough time to get the issue briefed so that your Honor can make a decision on all the record, that's all.

THE COURT: Well, let me put it this way. The way I'm hearing this, what you are telling me is that you want to look at all these records to determine how many Blood or gang members you have in the prison and that --

MR. DI DONATO: Your honor --

THE COURT: Wait a minute. And that that would justify

the policy. Then your argument really is one that assuming that you find two or three, you would want to use that to justify a policy that in Burlington County you are permitted to strip search everybody because of the issue of violence. And I don't think you need a hundred records for that. It's either an argument that wins or doesn't. Are you saying that Judge Brown said that if you find ten out of five thousand people that are gang members that you can justifiably strip search everybody that comes into the jail?

MR. DI DONATO: Judge Brown said that based upon, I [18] believe it was, 20 or 30 instances where drug paraphernalia was being taken into the county correctional facilities by non-indited offenders that we had the constitutional right to make every single person who entered the jail, indictable or non-indictable, strip naked, visually observe them for marks of identity or contraband and to make them squat and cough. And we have an order to that effect, Judge, and that's going to be an argument at least with respect to the warden as an individual.

THE COURT: Well, here's what I think. I don't think we have to extend discovery in order to determine --

MR. DI DONATO: If I -- your Honor, I apologize.

THE COURT: In order to determine and give time to look through all these records because your legal argument would be even if you fine ten, it justifies the policy.

MR. DI DONATO: Right.

THE COURT: And I think that legal argument can be

made without the necessity of a delay in going through all the records to determine that. Now, if it becomes from research and the legal argument a question that the numbers may justify a policy, that would be one thing. But I think to wait when your argument is essentially, look, we have violence -- because, I think most urban areas that have some degree violence can say that -- you know, the law with strip-searching is out the window. And that's basically what [19] I'm hearing. But, I think the legal argument can be raised without the necessity of going through all the records.

MR. DI DONATO: Okay. Certainly, we're willing to do whatever your Honor believes is most correct under the circumstances, we only ask that at this point that we at least, now that you've essential relieved us of the obligation to review all these items individually, give us, you know, a couple weeks, your Honor, that's all I'm asking, to get the briefs filed. I mean, they are significant briefs, there are going to be a lot of legal issues, and I'm just asking for some additional time. And I'm sure Ms. Lask will object to that, but under the circumstances, you know, we're just asking the Court for some help with this.

THE COURT: Well --

MS. LASK: You know, it's another delay in the summary judgment because I really -- I put the time in to put ours together and get it done. If they want one more week, fine, but this shouldn't have come to this with a letter. And honestly, under the local rules, with all due respect, Brooks, you should have called me as per the local rules

and talked about this discovery and told me what you had before we even got to court or you asked the Court's involvement. But in any event, there is no reason to keep delaying this. Honestly, we bet this --

THE COURT: Well, I would think this, I would think [20] that given a couple of weeks, August 20th we should receive --

MS. LASK: Okay.

THE COURT: -- the briefs that address the legal argument. And I think that, Ms. Lask, you hear what they are essentially saying the argument is.

MS. LASK: Yes.

THE COURT: Then if it becomes a question from legal research that the percentage of people searched can make a difference, then I think it would open another door. But I'm hearing that: Look, just if we find some, and we know there are some, it allows us to have a policy, I want to see that clearly researched. And I think if we have all the submissions by the 20th, then I can determine if we need oral argument or whether we can do it on the papers.

* * * *

APPENDIX Z — REPORT OF RAYMOND J. SABBATINE, DATED AUGUST 14, 2008

Albert W. Florence

V.

Burlington County et al.

U.S. District Court
District of New Jersey

Case No.: 05cv 3619 (JHR)

I. INTRODUCTION

I have been asked to offer my opinion as to the claim that Albert W. Florence was illegally strip searched during processing in Burlington and Essex County on a contempt of court charge, a minor non-indictable offense.

II. QUALIFICATIONS

My recent Curriculum Vitae is attached. I have been employed in the criminal justice system since 1972 when I held the position of regional administrator for the Kentucky Crime Commission. I assisted local units of government in planning for and administering block grant monies from the Law Enforcement Assistance Administration (LEAA). In 1973 I then became the Assistant Director of the local criminal justice planning agency in Lexington, KY. I returned to Kentucky State Government in 1974 to work in the Office of the Secretary

in Kentucky's first Department of Justice. I administered the Kentucky Criminal Justice Standards and Goals Grant and staffed the Juvenile Justice Committee of that program.

In 1976 I accepted the position of Jail Administrator in Lexington, Kentucky, closing two old jail facilities and opening a new 500 bed facility that year. Since 1976 I have been involved in several facility expansions and renovations as well as the planning and construction oversight of the recently completed 1200 bed facility. During my 25 year tenure as both an appointed and elected official my division has expanded into a community corrections model with responsibilities for juvenile and adult detention, adult misdemeanant probation, drug testing, day reporting, electronic monitoring and community service work programs. I retired from my last position of Director of Community Corrections in August 2001.

My teaching and consulting activities began in the 1980's. I instructed Corrections courses at Eastern Kentucky University. I have been a certified instructor of correctional curriculum since early 1980. I have taught and consulted for the National Institute of Corrections since 1990. I have assisted in developing policies and procedures for jails throughout the country for the last thirteen years. My areas of specialization are Classification, Strip Search, Mission Based Management, Suicide Prevention and Mental Health Crisis Management. I am also on the faculty of the Americans for Effective Law Enforcement (AELE) where I instruct at seminars on topics of Inmate Classification, Strip Search Policy Development, Inmate Discipline and Inmate Property Rights.

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In recent years I have become involved in litigation consultation and expert witness work for both the plaintiff and the defense. These cases primarily involved inmate classification, strip search and in custody deaths.

I believe my 30 years plus experience in planning, development, administration, training and public policy development qualify me to render expert consultation and opinion in the field of Corrections.

* * *

IV. MATERIALS REVIEWED

I reviewed the following materials to date in formulating my opinion in this case;

- First Amended Civil Complaint Adding Class-Action Claim to Count Three Herein, dated June 30, 2006
- Motion for Class Certification, dated September 19, 2007
- Opinion and Order of Honorable Rodriguez, dated March 20, 2008
- Essex Search Policy, "Search of Inmates and Facility", Directive No. 04-36, Effective 2-1-07
- Essex Search Policy," Reception/Classification" Order No. 89-17, Effective 9-27-02

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- Essex County Corrections "Prisoner Intake/Discharge" Strip Search Policy, effective February 1, 2007

- Essex Documents: Bench Warrant & Essex County Prosecutor Entry request, both issued August 25, 2003;Office [*sic*] of the Sheriff Address Information Request, dated May 29, 2003;Esex [*sic*] County Sheriff's Office "Report of Arrest", dated March 9, 2005; New Jersey Promis/Gavel, dated January 3, 2006; Det. John Minneli Pick Up Sheet "ready for PickUp [*sic*] March 9, 2005", dated March 8, 2005;

- Essex County Sheriff's Office Report of Arrest, "Charge:VOP/Hinder Prosecution", dated March 9, 2005;

- Bulrington [*sic*] County Detention Center, 2 pages (prints, Doc Sheet) dated March 8, 2005.

- Essex Jail Intake of Albert Florence (12 pages of Screen Print Listings and Inmate Information), "Charge Statue Code:2C:29-3

- Essex County Sheriff's Officer General Order "Prisoner Searches" No. 02-20, Effective October 15, 2002

- Essex Deposition Transcript Digests: Glover, Logue, Monroig, Salzano

- Burlington "Policies and Procedures" "Inmate Urinalysis", Section 1188, Effective January 1, 2004 (2 pages)

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- Burlington Response to Document Request, dated July 11, 2006

- Burlington "Standard Operating Policy and Procedure Manual" Secs. 10000-1292 Index Only; Section 1186, Search of Inmates, Effective Date January 1, 2004, including Strip Search Authorization Form (8 pages)

- Burlington/Cole's response to Plaintiff's Request for Production of Documents, dated (1-17 responses, 5 pages)

- Burlington Deposition Transcript Digests: Coleman, Gallagher, Palmer,Reeder [*sic*], Warden Cole

- Class Attorney Lask Letter to Defendant Burlington Counsel Savage regarding discovery needed, dated October 29, 2006

V. EXAMINATION

At the outset, it is important to note that this report is based upon the facts as presented by the material and specifically avoids drawing conclusions based upon credibility issues of the parties. Also, it is not to draw a legal conclusion, but to utilize the information generally used for jails in developing acceptable policy and procedure that I refer herein to certain key cases and law that clearly establish strip search policies. Many times in our training we utilize controlling case law for training Officers. The baseline in training would be some times higher than case law, which is an insurer's decision to go

above legal baseline, but usually not enough to interfere with jail security.

The Supreme Court beginning with *Bell v. Wolfish*, 441 U.S. 520 (1979) has clearly established that a jail can strip search an offender when there is "reason to believe" that the offender is in possession of a contraband. The "reasonable belief" standard in strip search cases has been predicated upon a belief in an offender's possession of weapons, drugs or other findings of "dangerous contraband" that poses a threat to the public, officers or incarcerated offenders. As Federal case law has evolved, it has been clearly established that "reasonable belief" justifies a strip search when those offenders that have been charged with criminal offenses or behaviors denote:

- Violence
- Drug possession
- Possession of dangerous contraband posing a potential threat to self or others

In the case of Albert Florence, the "reasonable belief" standard justifying a strip search was never established in either of the facilities within which he was processed. Mr. Florence was arrested on the evening of March 3, 2005 on a civil contempt warrant by a trooper with the New Jersey State Police. According to testimony in depositions by various witnesses, the civil contempt warrant is, and I reiterate their words, a "non-criminal minor civil offense". A "non-criminal civil offense" fails

to meet the "reasonable belief" standard required to justify a strip search; therefore, any strip search of an offender charged with a "non-criminal civil offense" would constitute an illegal strip search in violation of a person's 4th Amendment rights.

Regardless of the nuances in the terminology of "visual observation" versus "strip search" used by either Burlington or Essex County detention facilities, Federal Supreme Court case law (*Bell v. Wolfish*, 441 U.S. 520 (1979), and cases specific to New Jersey and the 3rd Federal Circuit Court of Appeal (*Davis v. City of Camden*, 657 F. Supp. 396, 399 (D.N.J. 1987); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220 (DNJ,1990); *O'Brien v. Borough of Woodbury Heights*, 679 F.Supp. 429 (D.N.J.1988); *Roderique v Kovac* 1987 WL 17058 (DNJ); *DiLoretto v. Borough of Oaklyn*, 744 F.Supp. 610 (DNJ,1990)), have clearly established that the removal of an arrestee's clothing in those situations when there is an expectation of privacy thereby exposing them to the viewing of part or all of the body is considered an illegal strip search. Nine of the other ten Federal Circuit Courts of Appeal have ruled similarly to the 3rd Circuit in their opinions regarding the constitutional basis for a strip search as being rooted in the establishment of "reasonable belief"; and therefore, absent the establishment of "reasonable belief" the strip search is unconstitutional.

Both Burlington and Essex Counties' Officers admitted in their depositions to the viewing of Mr. Florence in the absence any clothing ("naked") for the purpose of body examination, showering and clothing exchange

by a correctional officer. The Warden of Burlington County Detention admits that it is the practice of the Officers in his facility to "visually observe" all arrestees, both nonindictable and indictable. The viewing of Mr. Florence "naked" by both Burlington and Essex County Correctional Officers occurred in the absence of a "reasonable belief" that Mr. Florence was in possession of dangerous contraband either by virtue of his charge or demeanor. These actions by the correctional officers involved with the processing of Mr. Florence constituted an illegal strip search.

Any strip search policy that fails to even attempt to establish the propriety of a legal strip search based upon "reasonable belief" creates a blatant disregard for every arrestee's Fourth Amendment right to be free from an unreasonable search.

Burlington County policy

Mr. Florence was arrested and booked into Burlington County Detention Facility for a nonindictable offense on the evening of March 3, 2005. By virtue of Burlington's Policies and Procedures, "Search of Inmates", Section 1186, F, 1, dated January 1, 2004, "A person that has been detained or arrested for commission of an offense other than a crime and who is confined in an Adult Correctional facility **shall not** be subject to a strip-search unless there is reasonable suspicion that a weapon, controlled dangerous substance or other contraband will be found." Further, Burlington Policies and Procedures, "B.C.D.F. – Booking Officer(s)", Section 1277 dated January 1, 2004,

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Section 4, a, 1 stipulates that "...inmates committed on non-indictable charges shall not be stripped searched, however to shower and change into a jail issued uniform." This same policy mandates that Officers must "visually observe" inmates while showering to ensure application of Kwell to all areas of the inmate's body ("Officers will ensure the inmate applies Kwell to all areas on the body except the eyes." Section 4, b, 2) The condition that all arrestees with non-indictable offenses be showered and visually observed while showering constitutes a strip search.

In their depositions Officers Reeder, Palmer, Gallagher and Coleman, along with Warden Cole admitted to routinely conducting a "visual observation" of all arrestees. These "visual observations" occurred regardless of the status of the offenders – either "a person that has been detained or arrested for commission of an offense other than a crime" or "an inmate lawfully confined". This requirement is therefore a "blanket policy" of strip searching all arrestees booked into the Burlington County Detention Center. Mr. Florence was subjected, along with all other arrestees, to the "blanket strip search" policy. In referencing the New Jersey Administrative Code, section 10A:31-8.5 the case note for Davis v. City of Camden, 675 F. Supp. 396 (D.N.J. 1987) states "Strip search of newly admitted inmate found unjustified absent suspicion of concealed weapons or contraband: blanket strip search of all arrestees mandated by former rule found unconstitutionally supportable." Therefore, the "visual observation" constitutes an illegal strip search of Mr. Florence and is a violation of his 4th Amendment right to be free from unreasonable search.

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Essex County policy

Mr. Albert Florence was booked into Essex County for VOP-Hindering Prosecution, a minor non-indictable offense on March 9, 2005. Essex General Order Number 89-17 Policy V, A, 2, dated 9- 27-2002 states, "Place the inmate in the reception area where the inmate shall be stripped searched..." There is no further mention of any criteria circumscribing the parameters for the conduct of a strip search of arrestees regardless of the nature of their offense. This policy fails to articulate the criteria the Federal Courts have deemed necessary for the establishment of "reasonable belief" that a person is in possession of dangerous contraband. Therefore, according to Order Number 89-17, it was the policy of Essex County at the time of Mr. Florence's booking on March 9, 2005, to conduct a strip search of all arrestees in the absence of any articulated "reasonable belief".

Again, referencing N.J.A.C. 10A:31-8.5 case note, in Davis v. City of Camden, 675 F. Supp. 396 (D.N.J. 1987), "Strip search of newly admitted inmate found unjustified absent suspicion of concealed weapons or contraband: blanket strip search of all arrestees mandated by former rule found unconstitutionally supportable." The Essex County requirement to strip search all arrestees constitutes a "blanket strip search" policy to which Mr. Florence was subjected. This constitutes an illegal search of Mr. Florence and is therefore violating his 4th Amendment right to be free from unreasonable search.

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Deposition testimony from Essex County Warden Glover, Lieutenant Salzano, Sergeant Monroig and Officer Logue all indicated that it was common policy, practice and custom to observe all arrestees "naked" while undressing and then showering. Even Essex County's Warden Glover indicated that he has the expectation that Officers were to observe all arrestees as they exited the shower naked for the purpose of identifying tattoos, scars, body marks and open sores. The testimony of all Essex staff further indicates that multiple arrestees would be processed together naked and in close proximity further exacerbating the injury to the rights of arrestees. All indicated that these actions were undertaken without regard to the nature of the arrestee's offense. Officers had even set up a chair outside the showers to facilitate their observations of the arrestees.

Training issues

The depositions from Officers of both facilities indicate a significant lack of training in strip search policy. In some cases the strip search training occurred many years before – 10 years for Monroig. Both facilities indicate a deficiency of ongoing in-service training – according to Reeder from Burlington, Salzano, Logue and Monroig from Essex. Additionally, while Officer Reeder acknowledges training hundreds of Officers and civilians in jail policy and procedures he indicates that he is training them in practices that are in direct contravention of the strip search case law. Although there is recognition of the attempt on the part of Burlington County to establish reasonable belief as a standard for which strip searches

would occur, Warden Cole, through both policy and practice, violated the basic tenants **tenets** [*sic*] of legal strip search by permitting the illegal visual observation of naked arrestees by Officers in the shower areas.

Lack of policy required documentation

Both Burlington and Essex Counties have policies that mandate the proper documentation of all "visual observations" and/or strip searches. In deposition testimony this requirement of policy is recognized; yet the search documentation (either visual observation or strip search) for Mr. Florence is invalid and incomplete pertaining to Burlington, or completeley [*sic*] absent pertaining to Essex. Despite Plaintiff's requests, these documents for all arrestees from either county have not been presented for examination. There is some indication in the testimony of Warden Cole that at Burlington County the form was completed, while Officer Logue maintains that he has never completed a strip search form. Without the requisite documentation we must rely on the deposition testimony and the policies of both Essex and Burlington to ascertain the nature of the search conducted on Mr. Florence and all those processed at these facilities. This lack of search documentation jeopardizes the justification and reliability of the processes used in both facilities. It is the failure to properly document the propriety of strip search that contributes to the egregiousness of every arrestees' civil rights violation.

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Indictable versus non-indictable

Although non-indictable offenses would likely include those charges for which "reasonable belief" is not likely to be established, the contrary regarding indictable offenses is a false assumption. Although criminal charges are indictable, many offenses are nonviolent and non-drug indictments that would fail to meet the standard of "reasonable belief" justifying a legal strip search. Beyond the violation of Mr. Florence's rights is the concern that the current policies, procedures and practices violate the rights of not only non-indictable offenders but of many other offenders that have been strip searched without establishing a "reasonable belief" necessary to justify the strip search. Burlington and Essex Counties continue to base their legal strip search on criteria such as indictment, presence of scars, gang tattoos, vermin and other non objective elements of "reasonable belief" that have not been upheld in the Courts. They further aggravate the grievous nature of these searches by calling them something other than a strip search in their policies; in this case, a "visual observation". This use of language in the policy could be considered to be but a subterfuge used to continue the indiscriminate illegal strip searching of all arrestees which seems to be the case for both counties.

Many offenders are likely to be subjected to an illegal strip search under the current policies, procedures and practices of both Burlington and Essex Counties. Many legally strip searchable offenders are likely to undergo a less than thorough legal strip search because they are overwhelming performing visual observations. According

to the deposition of Officer Monroig he has never himself conducted a strip search. One would have to assume that he was conducting visual observations on arrestees he has processed. This type of practice exposes other offenders to dangerous contraband thus creating a "failure to protect" condition. Even the Officers are placed in greater danger when offenders are improperly searched.

Establishing "Reasonable Belief"

The evolving Federal case law of legal strip search policy has continued to challenge many aspects of the nuances of strip search legality, but the overwhelming acceptance of the illegal nature of a "blanket strip search" in the absence of "reasonable belief" has been the cornerstone of our trained policy for over fifteen years. In an attempt to develop reasonable strip search policy, both the American Corrections Association and the American Jail Association have exposed hundreds of jails and thousands of their staff to contemporary training materials and instruments (such as the strip search decision-tree) intended to inform jails of the necessity to establish "reasonable belief" as the baseline of legal strip search policy. Several states (notably Texas and Kentucky) have incorporated our strip search decision-tree instrument as the baseline for establishing "reasonable belief" and justification for the conduct of a strip search; and, conversely the justification for why a strip search was not conducted. Individual jurisdictions (such as Jefferson County, Colorado) use the decision-tree as the basis for their search practices.

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The entirety of our training career has been devoted to presenting seminars, writing articles (such as for the American Jail Association's *American Jails* magazine) and developing instruments to provide examples of the objective elements of "reasonable belief": felony violence, felony drug possession, dangerous contraband, offender demeanor, court appearances and custody status, exposure to contact with the public and other objective criteria. These materials and instruments have been provided in training seminars dealing with the classification of offenders, jail risk management and those seminars dealing directly with strip searches. Through classification training seminars presented on behalf of the American Jail Association and the National Institute of Corrections we have demonstrated the linkage between the identification of those offenders that present a risk to the public safety and the institutional safety and the development and implementation of an effective search policy establishing "reasonable belief" as a necessity for mitigating that risk. Through these seminars a concerted effort has been made to distribute the tools necessary for determining "reasonable belief". "Reasonable belief" can be utilized as a mechanism to identify the potential "dangerousness" of offenders that are violent, prone to drug smuggling and use, or the manufacturing, of dangerous contraband thereby increasing the risk to all persons in the jail.

"Reasonable belief" forms the basis for targeting those offenders that present the greatest threat to the institution and concentrates the focus of strip search resources on this group. The use of a broad-based policy

of strip searching of all arrestees under the guise of a "visual observation" dilutes these same resources so that no one receives a truly effective strip search, only a "visual observation". This was evidenced by some of the Officers claiming to have never conducted a strip search themselves. The outcome is that those that probably should have been strip searched were not and the vast majority of offenders that were not legally strip searchable were strip searched in violation of their 4th Amendment right. This contributes to the classification failures that result in an increased potential for violence, contraband, drug overdose deaths and self harm incidents to occur within these facilities.

Summary

It is my opinion, based upon my specialized training, background, experience, and education, as well as my continued research, writing, audits, training and continued work with jail facilities nationwide, and based upon my examination of the materials provided, that it is clearly evident from the policies, procedures and practices of both Burlington and Essex Counties that all arrestees are subjected to the same process of indiscriminate and illegal strip searches. Both Burlington and Essex Counties have failed in the past, and still continue to fall short, in sufficiently articulating those elements that the Courts have found to provide justification for the conduct of a legal strip search. As such, the practices used by Burlington and Essex Counties violated the 4th Amendment rights of Mr. Florence in his illegal strip search. These same Counties continue to violate the rights of those who have

previously been strip searched and those who may be strip searched in the future.

This expert report is based upon the materials provided to date and is subject to amendment in the event additional material is produced.

This report is signed under penalty of perjury this 14th day of August, 2008.

[signature Ray Sabbatine]
Ray Sabbatine

APPENDIX AA — REPORT OF GEORGE M. CAMP, DATED SEPTEMBER 11, 2008

George M. Camp
Criminal Justice Institute, Inc.
213 Court Street
Middletown, CT 06457
(860) 704-6400

Albert W. Florence

Plaintiff

v.

Board of Chosen Freeholders of the County of Burlington, Burlington County Jail, et at

Defendants

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
Civil Action No. 05-cv-3619

RULE 26 EXPERT REPORT
[Dated September 11, 2008]

Background

On or about September 1, 2008, I received a telephone call from Alan Ruddy, Assistant County Counsel for Essex County inquiring as to my interest and availability in

providing an opinion as to the need for strip searching prisoners at admission to a jail. I indicated that I would. I asked that documents be sent to me to review and agreed to provide him with my opinion. He agreed to compensate Criminal Justice Institute for my work at the hourly rate of $175. In addition, with his prior approval he agreed to reimburse the Criminal Justice Institute for any travel that I might undertake.

Documents were received on September 5, 2008. A list of those documents is attached to this report as Appendix A.

My expert opinions are based in part on more than 40 years of professional experience, expertise, training, education, and consulting that I have had in the field of corrections. This experience includes experience in facility security, operations, investigations, policies and procedures, inmate supervision, inmate care, automated inmate information systems, management and administration in local, state, and federal prison systems.

I am a principal at the Criminal Justice Institute, a not-for-profit entity that exists to assist those who manage and operate criminal justice agencies, primarily prisons and jails. In connection with my employment, I have worked with state legislators, courts, and executive branch stakeholders to develop and implement solutions to criminal justice problems; to formulate cost effective and practical approaches for resolving policy and operational differences; and to assess the impact that proposed action plans will have on the components of the criminal justice system. We have provided professional services

to correctional agencies and jail systems in 48 states and the Federal Bureau of Prisons. A copy of a description of Criminal Justice Institute projects is attached to this report as Appendix B.

Since 1985 I have also served as co-Executive Director for the Association of State Correctional Administrators ("ASCA"). The ASCA was formed in 1970 and represents the nation's leaders in the field of corrections. Its members are the directors of the 50 state correction departments, the Federal Bureau of Prisons, the Correctional Service of Canada, the Ontario Ministry of Correctional Services,the Commonwealth of Puerto Rico, the U.S. territories of Guam, Samoa, and the Northern Marianas Islands, and four major urban correctional systems - Chicago (Cook County), New York City, Philadelphia, and Washington DC.

As a member of the executive staff of the ASCA, I am involved in publishing a monthly newsletter and researching issues of critical concerns to correctional administrators. I am also inv~lved in developing training programs for members. I facilitate three-day training programs for newly appointed directors of correctional agencies. I also facilitate training for state directors of corrections, geared toward heightening awareness of critical corrections issues, sharing new techniques, and sharing critical experiences and strategies that have been used successfully in managing them. I have also authored numerous publications regarding correctional issues that are listed in my resume. [A copy of my resume is attached as Appendix C.]

Appendix AA

I have been retained as a consultant on correctional issues and provided significant expert testimony in approximately 15 court cases over the past 32 years. A list of expert testimony/depositions in the past four years is attached as Appendix D. Significantly, I provided consultation and expert testimony in *Wolfish v. Levi*, 573 F.2d 118 (S.D.N.Y. [*3] 1978), that resulted in seminal decision by the United States Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Turner v. Safely*, 482 U.S. 78, 92-93 (1987), Associate Justice O'Connor in the Court's majority opinion relied on one of my studies entitled *Prison Gangs: Their Extent, Nature and Impact on Prisons*, U.S. Department of Justice (1985) in considering whether a prohibition on correspondence between prison institutions served a legitimate penological interest.

Based on my more than 40 years of experience as a correctional administrator and a consultant to prison and jail systems, I formed these opinions.

OPINIONS:

1. **Admission Searches Should Be Conducted On All Arriving Inmates**

As I have indicated, it is my expert opinion that jail administrators must be allowed to conduct Admission Searches upon all inmates arriving at a jail, regardless of the nature of the criminal or civil charges against them. I recognize that the courts have drawn a distinction between inmates charged with felonies and all other arriving inmates, and prohibited Admission Searches of those

arriving inmates charged with misdemeanors (or other less serious offenses) unless there is a reasonable belief that an individual may be secreting contraband. From a peneological perspective, however, this distinction between felons and misdemeanant arrivals is unsupportable for many reasons.

First, inmates charged with misdemeanors can be more dangerous and can be more likely to bring in contraband because everyone knows that inmates charged with misdemeanors will not undergo an Admission Search. Contraband is most likely to be introduced successfully by persons that one is least likely to suspect. Why have something brought in by a person you are likely to search thoroughly when you can give it to another person you know will not be searched thoroughly? Further if a jail has contracted with the Justice Department to house immigration detainees, these individuals are civil detainees who can be among the most dangerous inmates in a jail.

The charge pending against the inmate simply is not reflective of the danger that the inmate poses to a jail, its staff or inmate population. Jail administrators must have the ability to conduct Admission Searches on all arriving inmates because the facility is only as secure as its weakest link. Permitting inmates charged with misdemeanors or civil offences to avoid these Admission Searches creates a substantial security gap at jail, which endangers all of the staff, inmates and members of the public that are there each day.

Second, the interaction and mingling between misdemeanants and felons will only increase the amount of contraband in the facility if the jail can only conduct admission searches on felons. (See Bell v. Wolfish, visual body searches are reasonable when all prisoners come in contact with one another on a regular and frequent basis). The overriding consideration is not the characteristics of the arrestee/prisoner, but the characteristics of the jail. Pre-arrival contact provides opportunity for felons to give contraband to misdemeanants to avoid detection of the introduction. As is the case in many jails, if felons and misdemeanants are assigned to the same housing unit, it increases the likelihood that contraband can be exchanged between prisoners. This increases the need to conduct Admission Searches of all inmates arriving at the OCCF.

Third, Admission Searches also are critical to the security of a jail as inmates frequently have contact with inmates assigned to other housing units when they participate in programs, recreation, visiting, or when receiving medical services. Such intermingling often involves contact between misdemeanants, civil detainees and felons. All are permitted social visits, and given the chance to go to the law library, attend religious services and participate in educational programs. Interaction and mingling between felons and misdemeanants within the jail increases the likelihood that contraband will be passed. However, when searches at admission are restricted, it is even more likely the contraband will be passed and risk of injury and harm to inmates and staff increases as a direct result of not searching all admissions/ [*sic*]

Finally, permitting jail staff to conduct Admission Searches on all arrivals will allow the facility to protect against potential suicides and prevent false claims of excessive force against correctional staff. All of these factors represent significant [*5] correctional and peneological interests that are promoted by permitting jail staff to conduct visual body searches on all inmates arriving at a jail.

2. **Admission Searches on All Inmates Will Diminish the Introduction of Contraband at the OCCF**

It is well-recognized in the corrections field that visual body searches provide an essential deterrent to inmates who are considering whether to try to smuggle contraband into a correctional facility. If an inmate knows they will most certainly undergo a visual body search each time they enter the jail, the amount of contraband that actually enters the jail is reduced considerably. In my expert opinion, visual body searches are a most effective deterrent to preventing the introduction of contraband into a jail.

Jail security is only as good as its weakest link. These weak links eventually are discovered by the inmate population and exploited to the detriment of both prisoners and staff. Fences and controlled/secured entrances and exits are meant not only to keep prisoners from escaping but just as importantly to keep unacceptable items and people from entering the jail. Jails are designed to be clean and clear of contraband at all times. Thorough precautionary measures must be taken to ensure that

this cardinal principal of jail and prison management is preserved.

A Court's injunction prohibiting Admission Searches except upon an individualized reasonable suspicion that the inmate has contraband creates a dangerous "weak link" in the security perimeter of a jail. During the initial admissions process at a jail, staff rarely receive information about a newly arriving inmate that would permit it to apply the factors articulated by the courts in determining whether a reasonable suspicion exists. In effect, this means that the courts have actually barred the jail from conducting these necessary searches even on those individuals that the courts have said they could search. This has creates an extremely "weak link" in the security system, which prisoners will seek to exploit once it is known to them.

4. [*sic*] Jails are More Dangerous than Prisons

The Second Circuit decision in *Shain* purports to justify the limitations on Admission Searches for inmates charged with misdemeanors or lesser offences by noting that prisons present more dangerous institutional outcomes than jails because they house convicted inmates, and thus there is less reason to conduct visual body searches at jails. In my expert opinion, exactly the opposite is true where these type of admission security issues are concerned.

Jails present a far more dangerous admission situation than at most prisons. It is true that prisons

house convicted inmates while most of the inmates in a jail are awaiting disposition or trial. However, a prison receives only convicted inmates that already have been in jail and thus the prison staff knows far more about the danger presented by the inmate at arrival at a prison than jail staff do when a person is admitted to a jail. Jai staff typically know only the name the inmate has given to authorities and the current charge against that inmate when he or she arrives at the facility. Before an inmate arrives in a prison, by contrast, the inmate already has been tried, convicted and gone through an elaborate pre-sentence investigation process. Moreover, convicted inmates usually arrive at prisons from jails or other secure facilities so they are far less likely to have contraband in their possession than those inmates who are admitted to a jail. Under these circumstances, the admissions process at a jail is far more dangerous than at a prison and justifies strip-searching all arriving inmate regardless of the charge pending against them.

5. Unwarranted Intrusion by the Courts Causes Security Problems

Court rulings against conducting Admission Searches of inmates charged with misdemeanors absent a reasonable suspicion that they are secreting contraband causes significant security problems that jails, despite their best efforts, cannot solve unless they are permitted to conduct visual body searches on all arriving inmates.

While many jails have instituted a policy of conducting thorough pat-down searches on all arriving inmates and

have increased the number of cell shakedowns and [*7] searches of inmates within the jail, these practices have created additional confrontations between correctional staff and inmates that might be unnecessary if the jail had the right to conduct Admission Searches on all new arrivals. As a consequence tension between inmates and staff increases which can and does lead to confrontations, and sometimes-violent confrontations. The overall level of tension in jail would be reduced if the institution could conduct strip-searches on all new arrivals.

6. Summary

A strip-search performs an essential function in protecting the security and institutional integrity of a jail. It materially decreases the likelihood of introducing contraband and thus promotes the health, safety and security of all inmates, staff and members of the public. It also deters inmates from attempting to secrete contraband, and thus reduces the possibility of dangerous confrontations within the facility.

The concept of having a reasonable suspicion standard for conducting strip searches on arriving inmates charged with misdemeanors and lesser offences is not-workable. A jail typically has so little information about arriving inmates that it cannot apply the factors delineated by the courts to determine whether a strip-search is permissible or required. This has created a substantial gap in the security of jails and Significantly increased the opportunities of inmates to introduce some form of contraband that would place both inmates and staff at risk.

Appendix AA

The possibility that an arriving inmate could be carrying contraband is sufficient reason and cause to perform a strip-search at admission.

The alternatives used by staff to try and stem the flow of contraband into a jail are not as effective. The increased level of pat-down searches and cell shakedowns have led to increased confrontations between inmate and correctional staff that would be unnecessary if strip-searches on all arriving inmates were allowed. From a peneological and correctional standpoint, it is illogical to bar strip searches of arriving misdemeanants and then permit visual body searches immediately thereafter when the prisoner arrives at his unit, or later after court appearances or social visits have concluded as the Supreme Court's decision in Bell v. Wolfish clearly allows. The admissions area is clearly a pathway through which prisoners and contraband travel into [*8] a jail. Access therefore must be carefully controlled and regulated. Conducting strip searches represents both a specific and general deterrent to the introduction of contraband. It is an effective practice that is proportionate to mitigating the risk inherent during the admission process. Both prisoner and staff safety is enhanced by conducting strip searches on all individuals who entered the secure perimeter of a jail.

APPENDIX BB — EXCERPT OF SUMMARY JUDGMENT HEARING, DATED NOVEMBER 10, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NUMBER: 05-3619 (JHR)

ALBERT W. FLORENCE

PLAINTIFF

-vs-

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL

DEFENDANTS.

SUMMARY JUDGMENT MOTION

DATE: NOVEMBER 10, 2008

MITCHELL H. COHEN
UNITED STATES COURTHOUSE
ONE JOHN F. GERRY PLAZA,
CAMDEN, NEW JERSEY, 08101

BEFORE:
THE HONORABLE JOSEPH H. RODRIGUEZ,
UNITED STATES DISTRICT COURT JUDGE,
DISTRICT OF NEW JERSEY,
SITTING AT CAMDEN, NEW JERSEY

Appendix BB

* * *

[45]

MR. DiDONATO: Your Honor, just one last quick point. Miss Lask's suggestion that we wanted a fuller record, no record and discovery is closed, has been advanced to show evidence that these are justified., First of all, and most important we suggest in Bell versus Wolfish the Court said you don't need a record. We're doing the analysis for you. Okay. And, that's what the Eleventh Circuit decision said, if you interpret Bell, they did the analysis of the blanket search policy versus the rights of non-indicted people excuse me, non-convicted people. There were pretrial detainees there. We don't have to get to it. I agree [46] with that, Your Honor. But more importantly in this particular case, Your Honor, I stood ready during the period when discovery was still open, and I believe that's the point we had several months of discovery left. I had 7 boxes of evidence that would have demonstrated issues that were actually occurring in the County Correctional Facility in Mt. Holly. This Court said, let me understand Mr. DiDonato, you are arguing a legal point, and the number of instances doesn't matter. I say, that's correct, Your Honor, but I stand ready to provide evidence that in this particular facility it is a reasonable policy not to require reasonable suspicion. And Your Honor said, let's go with the legal issues, first. I still have those materials. But what is important, Judge, whether we can point to one example or thousands, the Supreme Court in Bell was dealing with the situation where the defendants were able to produce evidence of only a single search that

produced contraband or weapons. The Court said that, speaking more to efficacies of the policy and it's deterrent effect on people trying to smuggle things in than it does to the threat.

STRIP SEARCH AUTHORIZATION

DATE: _____ TIME: _____

I, Sgt Clifton (PRINT NAME) AUTHORIZE Florence Abuty (PRINT NAME)

TO BE STRIP SEARCHED OR NOT TO BE STRIP SEARCHED FOR THE FOLLOWING

REASON (S):

_____ INDIVIDUAL DETAINED FOR INDICTABLE OFFENSE.

_____ REASONABLE SUSPICION THAT INDIVIDUAL IS CONCEALING CONTRABAND OR WEAPON. (MUST BE EXPLAINED BELOW).

_____ REASONABLE SUSPICION THAT INDIVIDUAL IS SUFFERING FROM A COMMUNICABLE DISEASE. (MUST BE EXPLAINED BELOW).

_____ INDIVIDUAL FAILS TO PROPERLY IDENTIFY HIMSELF.

EXPLANATION: _____

( ) INDIVIDUAL WAS NOT STRIP SEACHED: NONE OF THE ABOVE FACTORS ARE PRESENT

INDIVIDUAL WAS SHOWERED, KWELLED AND VISUAL OBSERVATION WAS MADE FOR RECENT INJURIES (✓) YES ( ) NO

SUPERVISORS SIGNATURE

FORM-IL-29

Best copy available

APPENDIX CC — STRIP SEARCH AUTHORIZATION

** ESSEX COUNTY SHERIFF'S OFFICE ** 3/09/05
CRIMINAL COURTS BUILDING, NEWARK N.J. 07102 23:39:17

** REPORT OF ARREST ** PAGE: 1

==========ARRESTEE INFORMATION==========CA#:05 001388==

NAME: FLORENCE, ALBERT
BLK/MALE/NONHIS HAIR:BLK EYES:BRO HGT:603 WGT:210 SBI:326995C
[redacted] AGE: 29 POB:JACKSONVILLE FL MAR:MAR FBI:880053FB8
AKA: BCI:A263281
OLN: LIS: PHT: - 00000
ADD: 1146 SCHMIDT LN BLD: APT: [redacted]
NORTH BRUNSWICK NJ 0890 PHN:732-9406187
EMP:

==========NEAREST RELATIVE==========

NAME: HOGANS, CAROR RELATION:MOTHER
ADD: 362 DOCK ST EAST ORANGE NJ 07017
BLD:2 F APT: PHN:973-6765175

==========ADDRESS DETAILS==========

PLACE OF DOREMUS AVE DOA: 3/09/05
ARREST: NEWARK NJ 00000 TIME:23:36
BLD/LOC: ECCF/BCI FL: BR:

ARRESTING OFF: CAPPA, SAMUEL SQUAD: UNIT:BCI
TOT: ECJ

==========R&I==========

SCIC/NCIC WANTED: TT#: OBI#: FP#: Y

==========WARRANTS==========

S#:04765038 BWN#:98-04-01657-I NAME:FLORENCE, ALBERT
CHARGE:VOP/HINDER PROSECUTION JUDGE:FALCONE, JOSEPH A.

==========CHARGES==========

INC#(S):

==========NARRATIVE==========

SUBJECT PICKED UP AT BURLINGTON PD AND
TRANSPORTED TO ECCF/BCI FOR PROCESSING.
PHOTO# J05-5561
WARRANT# 4765-038

END OF REPORT

SIGNATURE [signature] SUPERIOR OFFICER SIGNATURE [signature] ARRESTING OFFICER

APPENDIX DD — REPORT OF ARREST

```
2M0713                    NEW JERSEY PROMIS/GAVEL                    01/03/2006
AGE : 0001                    WARRANT DETAIL                         8:36
DSOLIV
ASE NUMBER     : 98000062                          DEFENDANT NO : 001
EFENDANT NAME : FLORENCE              ALBERT     W

EQ NO : 01  ISSUED DATE : 04  25  2003   ACTIVITY TYPE : BENCH WARRANT
TAGE TYPE      ENFORCEMENT HEARING      COMPLET TYPE  : WARRANT EXECUTED
OMPLET DATE : 03  10  2005              COMMIT RESULT :
UDGE        : WALSH                JOSEPH     A
ROSECUTOR   :
EFN ATTY    :
OMMENTS     : JAIL TEAM
```

PF7-PRIOR PF8-NEXT

Appendix DD

```
M0704                    NEW JERSEY PROMIS/GAVEL                    01/03/2006
SOLIV                       DEFENDANT  DETAIL                         8:36

ASE NUMBER     : 98000062                                  DEFENDANT NO : 001
EFENDANT NAME  : FLORENCE              ALBERT     W       CABS NO :
PN NUMBER      : 148797    DEF STATUS : ACTIVE/NON-FUGITIVE  WARRANT IND : N
EF FV DOCKET   :        000000 00      DV IND: N                MUNIC IND : N
HANGE DATE     : 03  10  2005                                 DISORDR IND :
AREER CRIM IND:          ELEC SURV IND :                     JAIL CASE IND : N
EFN ATTY NAME  : OPEN                  PDAN            FINGER PRINTED IND : Y
EFN ATTY TYPE  : PUBLIC DEFENDER            DATE ATTY ENTERED : 04  06  1998
ASE SUPR NAME  : CARENIO               ARLENE     B          TRACK ASSIGN :
SI REPT ORDER  : 05  04  1998  JAIL DAYS    : 002           PUBLIC LIC IND :
SI REPT COMPL  : 00  00  0000  SENT LENGTH : 02Y00M0000    PROBATION IND  : Y

************************ S U M M A R Y   D A T A ******************************
HARGING DOCUM  : INDICTMENT                  DISPOSITION DATE  : 05  04  1998
ISP ACTION     : GUILTY                      SENTENCE DATE     : 06  19  1998
ISP REASON     : GUILTY PLEA LESS IND        TRANSFER TO:

PF1-SCHD EVENT  PF2-EVENT   PF3-CHG DOC  PF4-MOTIONS   PF5-BAIL  PF6-WARRANT
PF7-ARREST  PF8-APPEAL   PF9-SENTENCE  PF10-SUSP PROC  PF11-PTI  PF12-ADD ATTY
PF13-JAIL   PF14-CABS INQUIRY
```

```
CM0700                    NEW JERSEY PROMIS/GAVEL                    01/03/2006
DSOLIV                    CASE/DEFENDANT DETAIL                          8:35

ASE NUMBER  : 98000062   MUNICIPALITY : 0711  JAIL CASE IND: N  CATEGORY : NI
RIME TYPE   : AAS        CREATION DAT : 01  05  1998    PROS JACKET CODE : RR
HANGE DATE  : 05  21  1998                  CASE STATUS : COMPLETE
ROSECUTOR   : BLUE                GWENDOLYN
NVESTIGATOR :
UDGE        : JUDGE                M
VIDENCE ID  : CONSOLIDAT  TRANSFER RESPO :       SUPERSESS DATE : 00  00  0000
ILDCAT CODE :
********************* D E F E N D A N T   D A T A *****************************
EFN NO : 001   DEFN NAME : FLORENCE              ALBERT      W   SPN NO: 148797
EFN STATUS : AA          DEFN CHNG DATE : 03  10  2005    WARRANT IND: N
ISORD IND  :      PP IND : Y     JAIL CASE IND : N         CAREER CRIMINAL :
EFN ATTY   : OPEN                PDAN                      DEFN ATTY TYPE: PD
P/B LIC IND :       RLEC SURV IND  :       CHG DOCUMNT: INDICTMENT
RE SENT ORD: 05  04  1998    PRE SENT COMP : 00  00  0000       TRACK ASSN:
ASE SUPRV: CARENIO               ARLENE     B    DISP DATE : 05  04  1998
CTION TYPE : GT  REASON : GUILTY PLEA LESS IND   SENT DATE : 06  19  1998
ENT LENGTH : 02Y00M0000      JAIL DAYS : 002              PROBATION IND : Y


  PF1 - DEFENDANT DETAIL
```

Case 1:05-cv-03619-JHR -JS Document 131-12 Filed 08/20/08 Page 5 of 6 PageID: 1913

ESSEX COUNTY SHERIFF'S OFFICE
TRANSPORTATION REQUEST

MINNEW John. — PERSON MAKING REQUEST
3-8-2005 — DATE AND TIME

Detective Bureau — COMMAND
4765-03 s. — CASE NUMBER

609-265-5801 — PHONE NUMBER
Miss Mobley — PERSON CONTACTED

Albert Florance. — NAME OF SUBJECT
973-621-4111 — PHONE NUMBER

Burlington County Jail — LOCATION OF SUBJECT
Jail — COURT/JAIL

3/8/2005 — PICK-UP DATE

SIGNATURE OF TRANSPORTATION SUPERVISOR

SIGNATURE OF DETECTIVE BUREAU SUPERVISOR

REMARKS:

(1) WARRANT
(2) Confirmed Through PRINTS
(3) PHOTO
(4) Ready for Pick/up.

3-9-05
8:30 A.M.
STILL open
NOT FPID

Case 1:05-cv-03619-JHR-JS Document 131-12 Filed 08/20/08 Page 6 of 6 PageID: 1914

CJIS RESPONSE

03/03/2005 19:21
Page 1

Incident No.	CD20/2005-00008388	Call Code	MOTOR VEHICLE STOP		
Date	03/03/2005 THU	Rcv	19:21:22		
Unit No.	714	Trooper(1)	FLYNN, JEFFREY	Trooper(2)	
Received Dt	03/03/2005 19:21	Msg Type	NJWP	Requested By	011110 KAMARAS, VANESSA

NC DDMV Response

MKE/MJ WANTED PERSON
NAM:FLORENCE,ALBERT W 3RD DOB:09/29/1975 SEX:M
**** NEW JERSEY WANTED PERSONS INQUIRY RESULTS *****
***** MATCH FOR NAME: FLORENCE,ALBERT W 3RD *****
AUTHORITY ORI/NJ0070000 BERKE CO SHERIFF
DATE OF ENTRY/05-05-2003
WANTED PERSON
NAM/FLORENCE,ALBERT
POB/FL DOB/09-29-1975 SOC/153847115
SEX/M RAC/B HGT/603 WGT/210
EYE/BRO HAI/BLK SKN/DRK
FPC/120512CI101811111207 MNU/OA-326995C
OCA/4765038 DOW/04-25-2003 MNU/98-04-01657-I
VIO/C STA/SA:10-1C CIVIL CONTEMPT
*** SUPPLEMENTAL INFORMATION TO FOLLOW ***
ADDITIONAL INFORMATION:
DET TORSEILLO /1146 SCHMIDT LN N.BRUNSWICK NJ 0890
2 PBI 880053FB8
STC/W125333501 OPERATOR/G95DURA
SYN NO:200300584323
---------- END OF NAME SEARCH ----------
*** END OF NEW JERSEY WANTED PERSONS INQUIRY RESULTS*****
1I:1
NJNSP65L7

Best copy available

APPENDIX EE — CJIS RESPONSE

PETITIONER'S BRIEF

RECORD AND BRIEFS

JUN 20 2011
OFFICE OF THE CLERK

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE PETITIONER

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Law Library

QUESTION PRESENTED

Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances.

PARTIES TO THE PROCEEDING BELOW

All the parties to the proceedings below are parties in this Court.

The petitioner is Albert W. Florence.

The respondents are the Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and in his official capacity as Warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; State Trooper John Doe, individually and in his official capacity as a State Trooper; John Does 1-3 of Burlington County Jail & Essex County Correction Facility who performed the strip searches; and John Does 4-5.

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BRIEF FOR THE PETITIONER

Petitioner Albert Florence respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey granting petitioner's motion for class certification (J.A. 6a) and denying reconsideration (*id.* 45a) are unpublished. The district court's opinion granting petitioner summary judgment (Pet. App. 48a) is published at 595 F. Supp. 2d 492. The district court's opinion certifying that decision for immediate appeal (Pet. App. 35a) is published at 657 F. Supp. 2d 504. The order of the United States Court of Appeals for the Third Circuit accepting jurisdiction over the appeal (Pet. App. 33a) is unpublished. The court of appeals' opinion reversing (Pet. App. 1a) is published at 621 F.3d 296.

JURISDICTION

The court of appeals issued its opinion on September 21, 2010. Pet. App. 1a. On December 10, 2010, Justice Alito extended the time to file the petition for certiorari until January 19, 2011. *See* App. No. 10A-586. Petitioner then timely filed his petition, which this Court granted on April 4, 2011. 131 S. Ct. 1816 (2011). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of

the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

STATEMENT OF THE CASE

Petitioner was arrested for a minor, non-criminal offense. Respondent jail officials acknowledged that they had no reason to suspect that petitioner was carrying contraband when they jailed him. But respondents nonetheless strip-searched him twice. The searches were both unconstitutional under a nearly uniform line of federal appellate authority and contrary to the expert policies adopted by every division of the U.S. Department of Justice. The Third Circuit nonetheless held that suspicionless strip searches never violate the Fourth Amendment.

1. Petitioner Albert Florence is the finance director of a car dealership. He lives in Burlington County, New Jersey, with his wife April and their three children.

On March 3, 2005, the Florence family was driving to the home of April's mother in the family's BMW to celebrate their purchase of a new home. A New Jersey state trooper stopped the vehicle in Burlington County. The trooper approached the vehicle and requested the identity of the owner. When petitioner identified himself, the trooper removed him from the car, arrested him, handcuffed him, and placed him in the patrol car.

When asked, the trooper told petitioner that he was being arrested on an Essex County, New Jersey, bench warrant. Petitioner had been arrested once before (though never jailed), and pleaded guilty to a

minor offense that required him to pay a fine in installments over time. When petitioner fell behind on the payments, a local judge found petitioner in civil contempt and granted the county a bench warrant for petitioner's arrest. J.A. 89a.

Petitioner promptly paid the balance owing on the fine. *Id.* 80a. The judgment underlying the warrant was at that point satisfied. Petitioner kept with him a copy of the official document certifying that fact, *id.* 86a, because in his view he had been previously been detained as an African American who drove nice cars and he wanted to avoid being wrongly arrested.

When petitioner was nonetheless erroneously arrested on the warrant, petitioner's wife retrieved the document and presented it to the New Jersey state trooper. But apparently because the county had failed to remove the warrant from the relevant computer system, the officer continued with the arrest.

2. State troopers transported petitioner to the local detention facility, the Burlington County Jail. Petitioner was to be held there until retrieved by officers from Essex County, which had issued the warrant, and which would resolve his status. Petitioner and April were told that would occur the next day. But petitioner was not retrieved for almost a week.

Under both New Jersey law and the Burlington County Jail's policy, an individual arrested for a minor offense – a "non-indictable" offense in the terminology of state law – "shall not be subjected to a strip search" absent a search warrant, consent, or

reasonable suspicion that he may possess contraband. N.J. Stat. § 2A:161A-1 (Pet. App. 101a); N.J. Admin. Code § 10A:31-8.4 to -8.7 (Pet. App. 105a-08a); New Jersey Attorney General's Strip Search and Body Cavity Search Requirements and Procedures (J.A. 72a); Burlington County Search of Inmates Procedure § 1186 (no strip search "unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found") (Pet. App. 126a); *see also* J.A. 33a (federal court authority in New Jersey has required reasonable suspicion since 1987), 218a (Burlington does not conduct a "strip search" of individual arrested on municipal charges, including contempt, absent reasonable suspicion).

In this case, officers at the jail knew that petitioner had been arrested for the non-indictable offense of "civil contempt." J.A. 53a (intake form), 110a. The jail also would have been aware of the circumstances in which petitioner was arrested and whether he had a history of carrying contraband, *id.* 236a, and furthermore checked petitioner's criminal history, *id.* 102a, all to determine whether there was reasonable suspicion to conduct a strip search, *id.* 10a, 111a, 143a. The officer responsible for petitioner's intake recorded that he was not strip-searched because there was no "reasonable suspicion" that he was carrying contraband. *Id.* 390a.

Burlington County nonetheless requires every detainee – whatever the circumstances – to remove all his clothes and undergo what the jail terms a "visual observation" by an officer. The county draws the distinction that a "visual observation" is intended to uncover not contraband but instead an

identifying marks or wounds, whereas a "strip search" (which is conducted only upon reasonable suspicion) is a "systematic" procedure that is intended to intercept contraband before the individual is admitted into the facility. J.A. 10a-13a, 118a, 167a, 390a (observation "for recent injuries").

The Burlington County jail's "visual observation" of petitioner, *id.* 137a, 390a, proceeded as follows. An officer took petitioner to a shower stall with a partially opened curtain. The officer removed petitioner's handcuffs and directed petitioner to strip naked. From roughly an arm's length away, the officer directed petitioner to open his mouth and lift his tongue, lift his arms, rotate, and lift his genitals. Petitioner was then directed to shower in the officer's sight.

Afterwards, petitioner dressed in a jail jumpsuit and was placed in a cell. Both this Court's precedents and New Jersey law generally required the county to present petitioner promptly to a magistrate judge for a probable cause hearing. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); N.J. Ct. R. 3:4-1(b), -2(a). The magistrate would have ordered petitioner's immediate release because he was not actually wanted for arrest. But the county never provided petitioner a hearing. During the six days they held petitioner, Burlington officials did not permit him to shower or provide him with a toothbrush, toothpaste, or soap.

3. On the sixth day, Essex County officers finally retrieved petitioner and transferred him to the Essex County Correctional Facility. Admittees at this facility are screened by a metal detector and also a Body Orifice Screening System (BOSS) chair that

identifies metal hidden within the body. J.A. 324a. At the time of the events of this case, Essex County's policy – which Essex subsequently changed to parallel Burlington County's – required a detailed strip search of all admittees no matter what the circumstances. Essex County Dep't of Pub. Safety Gen. Order No. 89-17 (Pet. App. 137a, 140a); J.A. 318a.[1]

Essex's search of petitioner was more extensive and public than Burlington's. Officers directed petitioner and several other detainees to enter a shower area, strip, and shower. Under close supervision of the officers and in the plain sight of each other and other employees entering the room, the detainees then stood together and were ordered to open their mouths, lift their genitals, turn around, squat, and cough.

Finally, a full week after his arrest, petitioner was transported to the Essex County Courthouse.

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[1] Under Essex's current policy, in the absence of reasonable suspicion, individuals arrested for non-indictable offenses are nominally not subject to a "strip search," but apparently those individuals are nonetheless still required to strip naked and be observed by officers. Essex County Directive No. 04-06 (J.A. 56a); J.A. 273a, 315a, 331-32a. As in Burlington, the facility is aware of the charge for which the individual is admitted. J.A. 275a. The circumstances of the intake process, such as an alarm by the metal detector or the BOSS chair, may also provide reasonable suspicion for a detailed strip search. *Id.* 332a.

The judge was advised that petitioner was not wanted for arrest and ordered his immediate release.

4. Petitioner subsequently filed this lawsuit pursuant to 42 U.S.C. § 1983 against, *inter alia*, the Burlington and Essex County entities, officials, and employees who were responsible for the searches conducted when he was admitted to the jails. As is relevant here, he alleged that respondents subjected him to suspicionless strip searches in violation of the Fourth Amendment.[2]

On the parties' cross-motions for summary judgment, the district court held that respondents' conduct violated the Fourth Amendment. Preliminarily, the court ruled that "[w]hether it is called a 'strip search' or a 'visual observation'—the distinction going only to the intrusiveness of the search—it is still a search for purposes of Fourth Amendment analysis." Pet. App. 65a.

The district court found persuasive that at the time of the events in this case the federal courts (including the District of New Jersey) had for decades uniformly held that suspicionless strip searches of

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[2] On petitioner's motion, the district court certified as plaintiffs a class of individuals "charged with non-indictable offenses" who were admitted to the Burlington County Jail or Essex County Correctional Facility after March 3, 2003, and "were directed by [respondents'] officers to strip naked before those officers, no matter if the officers term that procedure a 'visual observation' or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs, or weapons." J.A. 43a.

minor offenders violate the Fourth Amendment. *Id.* 69a-72a (citing, *inter alia*, *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987)); *see also infra* at 13 n.4. No federal court of appeals had disagreed with that view until the Eleventh Circuit's decision overturning that court's prior precedent in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). *See* Pet. App. 77a-78a. The court found compelling that, against this "overwhelming weight of authority," "neither county submit[ted] supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities." *Id.* 87a. The court took care to note that its ruling did not "prohibit[] jail officials from ever searching non-indictable offenders, assuming they have reasonable suspicion to do so." *Id.* 86a.[3]

5. After the district court certified its summary judgment ruling for immediate appeal, *id.* 46a, the Third Circuit accepted the certification, *id.* 33a, and reversed by a divided vote, *id.* 28a-29a. Before the court of appeals, the Burlington respondents abandoned their argument that their "visual observation" of respondent did not amount to a strip search. *Id.* 6a n.3. The Third Circuit held that the searches were permissible under the Fourth Amendment because they were conducted in

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[3] The court also held that Burlington Warden Cole was not entitled to qualified immunity in light of this uniform line of authority, including multiple decisions of the District of New Jersey, prohibiting suspicionless strip searches at the time of the events in this case. Pet. App. 94a-95a.

circumstances analogous to the searches of inmates who engaged in planned contact visits that this Court sustained in *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). The Third Circuit majority rejected petitioner's argument "that the risk that non-indictable offenders will smuggle contraband is low because arrest for this category of offenses is often unanticipated," reasoning: "Even assuming that most such arrests are unanticipated, this is not always the case. It is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest or non-indictable offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a. The majority also deemed irrelevant that respondents "have not presented any evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband." *Id.* 25a. It reasoned that "the Jails' justifications for strip searches would be stronger if supported by [such] evidence," but it concluded that in light of this Court's decision in *Bell*, *supra*, "the Jails are not required to produce such a record." *Id.*

6. This Court granted certiorari. 131 S. Ct. 1816 (2011).

SUMMARY OF THE ARGUMENT

The government has significant power to conduct reasonable searches of arrestees to ensure the security of jails. Arresting officers conduct pat-down searches. Jail officials then subject arrestees to metal detectors and other devices. The arrestees' possessions, including clothing, are subject to an inventory search. Detainees are then subject to being viewed in their undergarments by officers.

Several factors may give rise to reasonable suspicion justifying a more intrusive strip search or body-cavity search. The present offense, or a prior offense by the individual, may be a serious crime or may involve drugs or weapons, suggesting the possibility that the individual might be carrying contraband. The circumstances of the arrest may suggest that the individual was purposefully trying to gain admission to the facility. The preliminary searches at the jail may give rise to suspicion that the detainee is smuggling contraband. But when, as in this case, none of the circumstances give rise to any reason to believe that the individual may be carrying contraband, a strip search is unreasonable and therefore unconstitutional.

The same Fourth Amendment standard applies to jail searches as in every other context: the reasonableness of a jail search is determined by balancing the intrusion on individual privacy against the governmental interest. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). An order to strip naked before a government official is a dramatic intrusion upon personal privacy and dignity that falls within "a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). That is particularly true in the case of an individual unexpectedly arrested for a minor offense, who naturally will find the entire course of events terrifying. Strip searches are also particularly traumatic for a number of groups, including victims of domestic violence and sexual assault.

Accepting respondents' submission that jails may strip search any detainee without regard to the

circumstances invites a sweeping intrusion upon individual privacy. Americans are arrested with surprising frequency for an array of trivial offenses. The class certified by the district court in this case includes individuals who were strip-searched after being detained for infractions such as driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell.

This wholesale intrusion on personal privacy and dignity is not outweighed by an interest in deterring and detecting the smuggling of contraband into jails. That is an important interest, but not one that these policies advance materially. Respondents themselves maintain that their suspicionless "visual observations" of detainees are not designed to detect contraband. Respondents do conduct detailed strip searches intended to prevent smuggling, but only in cases of reasonable suspicion.

Most jails in this country have applied a reasonable suspicion standard for decades. That is also the rule adopted by all the relevant divisions of the U.S. Department of Justice. There is no evidence that it has led to an increase in smuggling. To the contrary, a reasonable suspicion standard improves jail security by focusing officers' attention on the detainees who present the greatest risk of smuggling.

The Third Circuit thought it was "plausible" that individuals would attempt to get themselves arrested in the hope that they would successfully evade detection and sneak contraband into jail. Pet. App. 23a. In fact, there is no evidence of any person attempting to do so, ever. Even if this does occur on rare occasions, that fact would not justify the massive intrusion on individual privacy of strip searches of

every person arrested for any minor offense, no matter what the circumstances.

The Third Circuit erred in concluding that *Bell v. Wolfish* excused respondents from producing any evidence that their strip-search policies deter or detect smuggling. The Court in *Bell* recognized the obvious point that inmates could use the opportunity presented by pre-planned, loosely supervised contact visits with outside visitors to smuggle contraband. In addition, inmates in that circumstance have a lessened expectation of privacy because a contact visit is a privilege, not a right. *Block v. Rutherford*, 468 U.S. 576 (1984). This is a very different case. Arrests for minor offenses are not opportunities to coordinate the introduction of contraband with inmates. The arrests almost always occur unexpectedly; in the event that an arrest appears purposeful, reasonable suspicion will exist, justifying a strip search.

ARGUMENT

The question presented by this case is not new or novel. There is a broad agreement among courts, governments, and professional organizations that it is unreasonable and unnecessary to conduct suspicionless strip searches of individuals arrested for minor offenses in the absence of reasonable suspicion that they are carrying contraband. Such a considered view does not itself establish a violation of the Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164 (2008). But it both informs the determination whether petitioner asserts an expectation of privacy that society regards as reasonable and plays an important role in this Court's assessment of whether

prison policies, in particular, are consistent with the Constitution. *See, e.g.*, *Brown v. Plata*, No. 09-1233 (2011) (slip op. at 43) (considering professional standards "when determining . . . what is acceptable in corrections philosophy"); *Johnson v. California*, 543 U.S. 499, 508 (2005) (relying on the manner in which "[v]irtually all other States and the Federal Government manage their prison systems").

In the wake of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), the federal courts of appeals uniformly held in numerous cases over the course of almost three decades that suspicionless strip searches of individuals arrested for minor offenses violate the Fourth Amendment.[4] No evidence emerged that such a rule facilitated smuggling into jails. As a Report commissioned by the U.S. Department of Justice concluded, jail officials "passionately believed that [these rulings] would result in major security problems because of dramatic increases in contraband entering the jail. However, these problems did not develop." William

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[4] *See Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County, Texas*, 767 F.2d 153 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). That consensus was not interrupted until the Eleventh Circuit reversed its prior precedent in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

C. Collins, Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Jails and the Constitution: An Overview* 28-29 (2d ed. 2007).[5] Instead, jail officials tended "to exaggerate a possible security threat." *Id.* at 28.

Every relevant division of the U.S. Department of Justice concurs. The Bureau of Prisons forbids suspicionless strip searches of minor offenders "unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." BOP Program Statement 5140.38, Civil Contempt of Court Commitments § 11 (2004). The Department of Homeland Security, which is responsible for immigration detainees, permits strip searches "only where there is reasonable suspicion that contraband may be concealed on the person, or when there is reasonable suspicion that a good opportunity for concealment has occurred." Immigration and Customs Enforcement Detention Standard: Searches of Detainees pt. 2, § 13 (2008). The U.S. Marshals Service, which houses eighty percent of its detainees in state and local jails, permits strip searches only "when there is reasonable suspicion that the prisoner may be (a) carrying contraband and/or weapons, or (b) considered to be a security, escape, and/or suicide risk." U.S. Marshals Service Directive, Prisoner Custody – Body Searches § 9.1(E)(3) (June 1, 2010). Finally, draft standards of the Bureau of Indian Affairs permit strip searches of arrestees detained in Native American jails only "when there is a reasonable belief or suspicion that he/she may be in

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[5] The Table of Authorities provides urls for documents available on the Internet.

possession of an item of contraband." Bureau of Indian Affairs, Office of Justice Servs., Adult Facility Guidelines 22 (2010 Draft).

The policies of the Department of Homeland Security and Bureau of Indian Affairs both explicitly incorporate the guidance issued by the American Correctional Association, which is the nation's premier organization of corrections professionals and the accrediting body for adult correctional facilities. The Association's "comprehensive" expert standards provide that "[a] strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." Am. Corrs. Ass'n, *Core Jail Standards* § 1-CORE-2C-02 (2010). *See also* Am. Corrs. Ass'n, *Performance-Based Standards for Adult Local Detention Facilities* § 4-ALDF-2C-03 (4th ed. 2004).

More than half of all Americans live in the eighteen states that prohibit suspicionless strip searches.[6] At least thirteen of these states adopted

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[6] *See* Cal. Penal Code § 4030(f) ("reasonable suspicion"); Colo. Rev. Stat. § 16-3-405(1) ("reasonable belief"); Conn. Gen. Stat. § 54-33L(a) ("reasonable belief"); Fla. Stat. § 901.211(2)(a) ("probable cause"); 725 Ill. Comp. Stat. 5/103-1(c) ("reasonable belief"); Iowa Code § 804.30 ("probable cause"); Kan. Stat. Ann. § 22-2521(a) ("probable cause"); 501 Ky. Admin. Regs. 3:120 § 3(1)(b) ("reasonable suspicion"); 26-239 Me. Code R. Ch. 1 § II(1)(B) (reasonable suspicion); Mich. Comp. Laws § 764.25a(1)(2)(a) ("reasonable cause"); Mo. Ann. Stat. § 544.193(2) ("probable cause"); Neb. Admin. R. & Regs.

these prohibitions before they were required to do so by one of the above-mentioned federal appellate decisions.[7] Among these is New Jersey, which has

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Tit. 81, Ch. 6, § 006.03A2, .03D4 ("reasonable suspicion" or "probable cause"); N.J. Stat. Ann. § 2A:161A-1(b) ("probable cause"); Ohio Rev. Code Ann. § 2933.32(B)(2) ("probable cause"); Tenn. Code Ann. § 40-7-119(b) ("reasonable belief"); Vt. Dep't of Corrs., Directive 315.01(II)(2) ("reasonable suspicion"); Va. Code Ann. § 19.2-59.1(A) ("reasonable cause"); Wash. Rev. Code § 10.79.130(1)(a), (1)(b) ("reasonable suspicion" or "probable cause"). Jails in major cities outside these states – such as Philadelphia, Pittsburgh, and Portland – now apply the same rule. *See* Mark Fazlollah, *Phila. to pay millions in suit over strip searches*, PHILA. INQUIRER, July 2, 2009, at A1; Len Barcousky, *Allegheny County agrees to settle jail strip-search suit*, PITTSBURGH POST-GAZ., Sept. 15, 2010, at B2; John Snell, *Suit claims jail strip searches were "illegal," "degrading,"* PORTLAND OREGONIAN, Dec. 11, 2006, at B2.

[7] Connecticut's 1980 law predated *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); New Jersey's 1985 law predated the Third Circuit's decision below; Virginia's law passed in April 1981 predated *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. Oct. 1981); Florida's 1981 law predated *Skurstenis v. Jones*, 236 F.3d 678 (2000); laws in Tennessee (passed 1982), Michigan (passed 1983), and Ohio (passed 1984) predated *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); Illinois's 1979 law predated *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980); Iowa's and Missouri's laws, both passed in 1980, predated *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); California's March 1984 law predated *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. Nov. 1984); and the laws in Kansas (passed 1981) and Colorado (passed 1982)

forbidden strip searches of persons charged with minor offenses for more than a quarter-century. N.J. Stat. § 2A:161A-1 (enacted 1985) (Pet. App. 101a); N.J. Admin. Code § 10A:31-8.4 to -8.7 (Pet. App. 105a-08a). As Republican Governor Tom Kean said in his signing statement: "It is an outrageous abuse of authority to subject a person detained for a motor vehicle violation, for instance, to a strip search . . . . [I]t is a violation of a person's privacy and dignity and cannot be tolerated or condoned." Press Release (Mar. 7, 1985) (on file with the New Jersey State Law Library).[8]

In this case, respondents do not dispute that they had no reason to suspect that petitioner was attempting to smuggle anything into their jails.

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predated *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). While Washington State's law was passed after *Giles v. Ackerman*, Washington legislators had previously instructed the corrections board in 1983 to "recommend categories of persons in custody who should not be subject to search." *See* Wash. Senate Bill Report at 2, E.S.H.B. 1148 (Feb. 27, 1986).

[8] Similarly, the American Bar Association's applicable Criminal Justice Standard, reflecting the consensus judgment of attorneys who represent both arrestees and governments, is that "[a] strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit." ABA Criminal Justice Standard 23-7.9(d)(ii).

Petitioner was arrested merely for failing to pay a fine. He sought to avoid being jailed, protesting (correctly) that he was not wanted for arrest. He has only one prior criminal offense, and it did not involve guns, drugs, or any other facts that suggested his involvement with contraband.

Nonetheless, respondents twice subjected petitioner to extremely degrading searches. They required him to stand naked before officers (and in the case of Essex County, several other inmates), turn around, and lift his genitals. For the reasons that follow, that entirely suspicionless conduct was unreasonable.

I. Strip Searches Of Arrestees Are Subject To The Fourth Amendment's Requirement Of "Reasonableness."

This Court has twice held that ordinary Fourth Amendment principles govern a claim that jail or prison officials engaged in an unreasonable search of a detainee. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). In such a case, "as in other Fourth Amendment contexts," the inquiry is whether "a 'justifiable' expectation of privacy is at stake" – *i.e.*, whether the individual claims "the kind of expectation that 'society is prepared to recognize as reasonable.'" *Hudson*, 468 U.S. at 525 (quoting *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring)). That determination "necessarily entails a balancing of interests": "the interest of society in the security of its penal institutions and the interest of the prisoner in privacy." *Id.* at 527.

The Court has applied the traditional Fourth Amendment inquiry into reasonableness in every possible setting, including not only jails and prisons (as in *Bell* and *Hudson*, *supra*), but also – for example – schools, *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), borders, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and sensitive facilities such as airports, *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam), where "the need for [particular searches] to ensure public safety can be particularly acute," *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). Consistent with that uniform approach, the Court has not held that the Fourth Amendment's application to jails and prisons is subject to the more deferential analysis of *Turner v. Safley*, 482 U.S. 78 (1987), which applies "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)) (emphasis in original). The Court's Fourth Amendment doctrine accounts for the context of incarceration by treating it as a central component of the reasonableness of the individual's expectation of privacy in that unique setting. *Hudson*, 468 U.S. at 527; *Bell*, 441 U.S. at 559-60.

The justification for applying ordinary Fourth Amendment principles, rather than deferring broadly to the judgments of jail officials, is at its apex with respect to intake searches, which generally occur before a magistrate judge assesses whether there is probable cause for arrest. Manifestly, because arrestees have not been convicted, they are not subject to the government's broad authority to impose punishment. *Compare McKune v. Lile*, 536 U.S. 24,

36 (2002) ("A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction."). But more than that, petitioner was detained by a police officer and searched twice by jail officials before respondents provided "a neutral and detached magistrate" with the opportunity to "protect[] against unfounded invasions of liberty and privacy" through a probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). At least until a judge decides whether there is in fact a lawful basis to place an individual within the control of jail officials, who will subject him to a strip search, there is no basis to abdicate the judiciary's traditional and firmly established role in assessing whether governmental conduct constitutes an "unreasonable" search or seizure. U.S. CONST. amend IV.

For the reasons that follow, strip searches of inmates arrested for minor offenses are subject to "the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997). "The demand for specificity in the information upon which policy action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21 n.8 (1968). This Court has rejected that requirement only "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). A strip search of a person

arrested for a minor offense amounts to such a significant intrusion on personal privacy and dignity, and the justification for that intrusion is so meager, that it must be justified by *some* form of suspicion.

II. Suspicionless Strip Searches Of Individuals Arrested For Minor Offenses Constitute A Dramatic Intrusion On Personal Privacy And Dignity.

1. The first component of the Fourth Amendment reasonableness inquiry is the degree to which a search infringes upon privacy. The Third Circuit's passing acknowledgment "that a strip search constitutes a 'significant intrusion on an individual's privacy,'" Pet. App. 19a (citation omitted), is a substantial understatement. In fact, jail strip searches intrude on the very core of the personal dignity protected by the Fourth Amendment. Many other searches – such as searches of a home – implicate a zone of privacy from which an individual may seek to exclude the government but into which he will otherwise freely admit friends and family. A strip search, by contrast, much more dramatically forces the individual to expose an entirely private domain: areas of his body that he may have kept private from all but an intimate partner and medical professionals.

The Fourth Amendment's "overriding function" is to "protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). The "meaning" of a strip search when specifically demanded by the government, as well as "the degradation its subject may reasonably feel, place a search that intrusive

into a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Jail strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). It is an "invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 383, 395 (10th Cir. 1993).[9]

"Prisoners retain the essence of human dignity inherent in all persons." *Plata*, *supra* (slip op. at 12). Yet a jail official's command that a person arrested for a minor offense strip naked conveys the stark message that the individual has lost one of the most basic rights of privacy in our society and is regarded as no more than a common criminal. The power to safeguard the privacy of one's body "safeguards human dignity as defined by modern society." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 537 (2006). Individuals ordered to expose themselves can "experience a severe and sometimes debilitating humiliation and loss of self-esteem." *Id.*

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[9] *Accord, e.g., Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute."); *Wood v. Clemens*, 89 F.3d 922, 928 (1st Cir. 1996) ("extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual"); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) ("so intrusive and demeaning").

An individual's display of his naked body is indeed so unusual in our society that in certain contexts it is itself a criminal offense.

The jarring psychological harm that a jail strip search may generate is magnified considerably in the case of persons arrested for minor offenses who (like petitioner) have never before been jailed. The course of events "take[s] that person by surprise, thereby exacerbating the terrifying quality of the event." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (citation omitted).

Here, petitioner was innocently driving with his family to his mother-in-law's home. He was arrested and handcuffed by police, and taken to the Burlington County jail. As of that moment in his life, petitioner had "never been . . . seen naked in front of a man" other than his father. J.A. 252a. Because the officer had "look[ed] at [him] with no clothes on, naked, [petitioner] just wanted to get away from him as quickly as [he] could." *Id.* 254a. The Seventh Circuit similarly recounted the effects of a strip search of a female physician arrested in Chicago, who suffered "reduced socializing, poor work performance, paranoia, suicidal feelings, depression, and an inability to disrobe in any place other than a closet." *Joan W. v. Chicago*, 771 F.2d 1020, 1021-22 (7th Cir. 1985).

When officers perform strip searches on all detainees without regard to the circumstances, they become desensitized to these traumatic and dehumanizing effects. *See Bull v. City & County of San Fran.*, 595 F.3d 964, 1000 (9th Cir. 2010) (en banc) (Thomas, J., dissenting). If jails instead make some effort to assess the risk presented by particular

detainees, they will view arrestees as "individual humans, rather than as booking-numbered objects to be processed." *Id.* (citing PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007) (describing Stanford prison experiments on guard and inmate behavior)).

2. Strip searches are especially traumatic for certain populations. The event may cause victims of sexual attacks and domestic abuse to relive their assaults. A woman strip-searched in Australia after having been raped called her mother inconsolable, repeating "[t]hey've done it again, they've done it again." Jude McCulloch & Amanda George, *Naked Poker: Strip Searching in Women's Prisons*, *in* THE VIOLENCE OF INCARCERATION 107, 116 (Jude McCulloch & Phil Scraton eds., 2009). Six weeks later, she hung herself. *Id.* at 116-17.

Members of cultures and religions that place a premium on modesty find strip searches especially traumatic. *See* McCulloch & George, *supra*, at 114 (discussing Catholic women incarcerated in Northern Ireland). Women who are menstruating or lactating may be subject to extreme degradation. For example, Colorado police mistakenly arrested Mercedes Archuleta on a warrant for another person, but strip-searched her even after recognizing their error. *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008). Archuleta began to lactate, but was ordered not to cover herself with her arms; instead, a male guard was directed to cut a maxi-pad in half for her to use. *Id.*; *see also* RUSSELL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 205 (1986).

3. Respondents' contrary position that the Fourth Amendment permits indiscriminate strip

searches has sweeping implications. The number of trivial offenses for which individuals are regularly arrested – and would be subject to indiscriminate strip searches under the Third Circuit's decision – is astonishing. The class certified in this case includes individuals arrested for the following offenses:

- *car equipment violations*, such as driving with a noisy muffler, an inoperable headlight, bald tires, high beams on, or without a driver's-side mirror, operable windshield wiper, or fastened seat belts;
- *moving violations*, such as failing to obey a traffic signal, stop at a stop sign, or use a turn signal; improperly backing, making a U-turn, turning right, and turning at a green light; and crossing a double line;
- *parking violations*, such as parking in a no-parking zone; and
- *bicycle violations*, such as improperly riding a bicycle and riding without an audible bell.

The police thus regularly invoke their settled power to arrest an individual lawfully for any minor offense. Officers conducted a strip search in a case that closely parallels the arrest of a girl for eating a french fry in a Metro station. *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148 (D.C. Cir. 2004). A woman arrested for eating a sandwich on the Metro was strip-searched in full view of male guards; when she began to cry, she was locked in an isolation cell for fifteen hours in only her underwear. Karlyn Barker, *Woman Arrested for Eating on Metro Sues Over Strip Search*, WASH. POST, Oct. 1, 1980, at C1.

Other reported examples abound:

- California: Sister Bernie Galvin, a nun who appeared at an anti-war protest and was charged with trespassing. *Bull*, 595 F.3d at 989 (Thomas, J., dissenting).
- Washington, D.C.: Bettye Heathcock, who attempted to exit a parking garage immediately upon entering because she thought the cost was too high and was charged with "false pretenses." Al Kamen, *Police, City in Contempt Over 1982 Strip Search*, WASH. POST, Jan. 5, 1983, at B1.
- Kentucky: Karen Masters, who failed to appear in traffic court because the judge gave her the wrong appearance date. *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989).
- Maryland: Vivian Anderson Smith, who failed to appear at a child support hearing and "was ordered to remove her clothing and squat while a female guard inspected her vaginal and anal cavities in the presence of another female detainee." Joseph D. Whitaker, *Strip-Searches Are Halted in Montgomery*, WASH. POST, Sept. 17, 1982, at C1.

4. The failure to conduct a strip search "in a reasonable manner," *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), "further contributes to the humiliating and degrading nature of the experience," Pet. App. 84a, and renders even an otherwise lawful search unreasonable, *see Campbell v. Miller*, 499 F.3d 711, 713 (7th Cir. 2007); *Logan v. Shealy*, 660 F.2d 1007, 1014 (4th Cir. 1981). Here, the Essex respondents

required petitioner to appear naked in front of multiple officers and several other arrestees, lift his genitals, turn around, squat, and cough. That was particularly "painful": petitioner was "very uncomfortable" because if you look "to your left and one guy is kind of staring," and you look "to your right, and the other guy is staring." *Id.* 257a.

III. The Intrusion On Personal Privacy From Suspicionless Strip Searches Is Not Outweighed By A Governmental Interest In Reducing The Smuggling Of Contraband Into Jails.

Despite this dramatic intrusion on personal privacy, the Third Circuit held that a jail may strip search any person detained for any purpose no matter what the circumstances on the theory that such a policy deters and detects the introduction of contraband into the facility. Pet. App. 23a. That assertion is refuted by respondents' own policies, common sense, and the experience of jails around the nation.

1. The Third Circuit's decision cannot be reconciled with the search policies adopted by Burlington and Essex Counties. Respondents cannot hope to deter smuggling by sending a message to potential arrestees when both New Jersey law and their own stated policies expressly forbid suspicionless strip searches. *See supra* at 4-6 & n.1. As to the detection of contraband, both jails have adopted policies that avowedly are *not* intended to uncover illicit materials. A principal argument of the Burlington respondents in the district court was that in the absence of reasonable suspicion they subject a

detainee only to a brief "visual observation," not an exhaustive "strip search." The Essex respondents adopted the same policy after the events of this case. In the court of appeals, respondents properly conceded that requiring admittees to remove their clothing for any purpose amounts to a Fourth Amendment search. Pet. App. 6a n.3. But the relevant point is that respondents avowedly do *not* currently engage in searches in a manner that they maintain is calibrated to uncover contraband, absent reasonable suspicion.

2. The Third Circuit majority ignored doubts about the effectiveness of respondents' policies and found no Fourth Amendment violation on the mere basis that it "is *plausible* that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a (emphasis added). The Eleventh Circuit similarly found it sufficient that "[n]ot *everyone* who is arrested is surprised" by the arrest and therefore unable to engage in coordinated smuggling. *Powell v. Barrett*, 541 F.3d 1298, 1313 (11th Cir. 2008) (en banc) (emphasis added). This Court can assume that the scenario described by those courts may occur on very rare occasions. But most of even those few instances would be detected, either through the jail's use of pat downs and metal detectors, or because the circumstances of the arrest give rise to suspicion justifying a strip search. The relevant question is whether the remaining tiny risk of smuggling justifies subjecting thousands of individuals to the gross intrusion and loss of dignity of a strip search.

As the dissent below explained, "what might in some imagined circumstances be 'plausible' is without support in the record." Pet. App. 31a n.1. Both New Jersey state law and rulings of the District of New Jersey have long forbidden suspicionless strip searches. *See supra* at 4, 8. Yet as the district court noted, respondents produced no evidence "that detail[s] evidence of a smuggling problem specific to their respective facilities," Pet. App. 87a, much less evidence that a prohibition on suspicionless strip searches would give rise to smuggling. The Third Circuit majority in turn acknowledged that respondents "have not presented any evidence of a past smuggling problem of any instance of a non-indictable arrestee attempting to secrete contraband." *Id.* 25a.

Similarly, as discussed, suspicionless strip searches have been forbidden in the overwhelming majority of the country for decades by state statutes and federal court decisions. But as the study commissioned by the Department of Justice concluded, *see supra* at 13-14, and litigation before the federal courts reveals, there is not "a single document[ed] example of anyone [concealing contraband during arrest for a minor offense] with the intent of smuggling contraband into the jail." *Bull*, 595 F.3d at 990 (Thomas, J., dissenting).

The most exhaustive review of this question by a federal court was conducted with respect to New York's Orange County Correctional Facility in *Dodge v. County of Orange*, 282 F. Supp. 2d 41 (S.D.N.Y. 2003). During a four-year period, the jail strip searched all incoming detainees. The court examined every arrest record to determine whether permitting

the jail to do so only when reasonable suspicion existed would have reduced the amount of contraband discovered. It concluded that of the 23,000 searches, there was at most *one* instance in which a person smuggling drugs – and none carrying weapons – might have evaded detection under a reasonable suspicion regime.

The facts of this case illustrate the implausibility of respondents' claim that smuggling in these circumstances is a material problem. Respondents must imagine that petitioner drove around with his family with drugs strapped below his genitals hoping the car would be pulled over without even engaging in a moving violation, having paid a fine precisely to terminate the warrant for his arrest, while carrying the paperwork with him to ensure that he was never wrongly arrested, all as a giant effort at misdirection. Once arrested, both this Court's decisions and New Jersey state law required that he be presented promptly to a magistrate, who would have ordered his immediate release. It is not even "plausible" that smuggling could occur in these circumstances. *Contra* Pet. App. 23a. This Court should no more approve the dramatic intrusion of a strip search in these circumstances than it authorizes searches of the vehicles of individuals detained in police cars on the premise of "the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules,'" *Thornton v. United States*, 541 U.S. 615, 626 (2004)

(Scalia, J., concurring in the judgment). *See Arizona v. Gant*, 129 S. Ct. 1710 (2009).[10]

None of the foregoing is intended to deny that smuggling into jails is a significant problem. *See Bell*, 441 U.S. at 559. But the evidence shows that individuals arrested in suspicionless circumstances for minor offenses are not a remotely material source of that problem.

3. To the extent that there is a reasonable prospect that minor offenders will attempt to engage in smuggling, jails have numerous alternatives at their disposal to detect contraband. At the point of arrest, officers uniformly search "the arrestee's person and the area within his immediate control." *Gant*, 129 S. Ct. at 1716 (citations and internal quotations omitted).

Upon arrival at the jail, officers may conduct an inventory search of every detainee's clothing and any other property. *Colorado v. Bertine*, 479 U.S. 367, 371-73 (1987). They may pat the individual down, subject him to a metal detector, and visually inspect

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[10] Most smuggling is instead facilitated by jail employees. *E.g.*, David R. Shaw, Cal. Insp. Gen., *Inmate Cell Phone Use Endangers Prison Security and Public Safety* 6-7 (May 2009); Fla. Office of Program Pol'y Analysis & Gov't Accountability, *Corrections' Contraband Effort Is Sound* 5 (Apr. 2008). Two Essex County officers were thus recently arrested for playing a leading role in a smuggling ring that "hand-delivered drugs and cell phones" to detainees. *See* James Queally & Amy Ellis Nutt, *13 Charged in Essex Jail Smuggling Ring*, THE (NEWARK, N.J.) STAR-LEDGER, July 30, 2010, at 1.

him in his undergarments. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001); *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1983). The Essex Warden testified in this case that the facility's Body Orifice Scanning System can "pinpoint" metal objects hidden within inmates still more accurately. J.A. 334a. Indeed, Essex attempted to suggest in the district court that the BOSS chair made strip searches unnecessary. *Id.* 39a.[11]

Individualized circumstances may justify the substantially greater intrusion of a strip search or even a body cavity search. The ordinary searches described above may give rise to suspicion that the detainee is carrying contraband. Also, reasonable suspicion justifying such a search may arise from the nature of the offense (such as crimes involving drugs or violence), the circumstances of the arrest (as when it appears that the inmate hid materials or was

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[11] Even more advanced technology is rapidly becoming available. Jails in Illinois and Florida use the Canon RadPro SecurPass, which produces body scans so detailed that they display "something as minute as a filling in someone's tooth," Elaine Pittman, *County Jails Deploy Whole-Body Scanners to Detect Hidden Weapons or Contraband*, GOV'T TECH., Apr. 27, 2011. Because this search takes seven seconds, rather than the fifteen minutes of a strip search, Chicago's Cook County Jail concluded that the RadPro system not only improves "the jail's search capabilities" but "also saves money." *Id.*

attempting to gain admission to jail), or the detainee's prior criminal history.[12]

Finally, in addition to the foregoing, many jails simply "isolate arrestees [accused of] minor offenses from the general jail population." *Giles v. Ackerman*,

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[12] *See Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding reasonable suspicion can be based on "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest"); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) ("Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record."), *overruled by Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045 (7th Cir. 1995) (same); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 197 (5th Cir. 1988) (same); *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 957 (6th Cir. 1987) (noting that most circuits have held that blanket strip searches violate the Fourth Amendment absent "reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband") (collecting cases); *see also* U.S. Marshals Service Directive § 9.1(E)(3) (June 1, 2010) (reasonable suspicion justifying strip search may arise from: ""Serious nature of the offense(s) charged, i.e., whether crime of violence or drugs; Prisoner's appearance or demeanor; Circumstances surrounding the prisoner's arrest or detention; i.e., whether the prisoner has been convicted or is a pretrial detainee; Prisoner's criminal history; Type and security level of institution in which the prisoner is detained; or History of discovery of contraband and/or weapons, either on the prisoner individually or in the institution in which prisoners are detained.").

746 F.2d at 618. Burlington County appears to follow some form of this practice. J.A. 134a, 205a, 210a.

4. There is no substantial argument that jails cannot effectively administer a "reasonable suspicion" standard. That rule has long governed searches in most of the nation's jails, including with respect to all arrestees in the federal system, with no reported difficulty. Both Burlington County and Essex County themselves apply precisely that standard today, and neither submitted any evidence that it is unadministrable. Thus, the form recording petitioner's intake at the Burlington facility specified that he was to be subject to a "visual inspection" rather than a strip search because there was no reasonable suspicion that he was carrying contraband. *Id.* 390a. In making that judgment, officers were aware of the offense for which petitioner was arrested and his prior criminal history. *See supra* at 4.

New Jersey law also requires respondents to classify detainees upon admission based on factors including their offense, previous incarceration, behavior, addiction(s), confinement status (such as pretrial detainee or sentenced inmate), and other similar security concerns. N.J. Admin. Code § 10A:31-22.2(a). Classifying incoming detainees based on their charges and background has long been regarded as an "essential management" tool for jails. James Austin, Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Objective Jail Classification Systems: A Guide for Jail Administrators* 8 (Feb. 1998).

Such practices focus officers' attention on the detainees who present the greatest risk and improve security. When San Francisco replaced its policy of

strip searching a wide array of inmates with a reasonable suspicion standard, it continued to discover drug contraband at the same rate (once per month), but the rate at which it discovered weapons tripled (to once every five months). *Bull v. City & County of San Francisco*, No. C 03-0184 CRB, 2006 U.S. Dist. LEXIS 9120, at *6 n.3 (N.D. Cal. Feb. 23, 2006). In a related context, the National Institute of Corrections – a division of the U.S. Department of Justice that provides training and guidance to local facilities – advises that focusing jail resources on the particular detainees who present the greatest threat provides "[i]mproved security and control of inmates by identifying and providing appropriate surveillance for each group and by assisting the corrections staff in knowing what 'kind' of inmates are where." Austin, *supra*, at 8; *cf. Terrorism and Transportation Security, Before the Subcomm. on Transp. Security of the H. Comm. on Homeland Security*, 112th Cong. (2011) (statement of John Pistole, Administrator, Transportation Security Administration) (TSA plans now to focus its efforts on persons "that we assess . . . may be a higher risk," replacing its prior "one size fit[s] all approach," which was not "efficient or beneficial for the traveling public or for security").

IV. The Third Circuit's Contrary Reliance On *Bell v. Wolfish* Was Mistaken.

The Third Circuit majority dismissed respondents' failure to produce any evidence that suspicionless strip searches are necessary to reduce smuggling on the theory that under this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), "the Jails are not required to produce such a record," Pet.

App. 25a. *Bell* did not, however, depart from ordinary Fourth Amendment principles under which the government must justify such a significant intrusion on individual privacy and dignity.

Bell held that a correctional facility may conduct a strip search (including visually inspecting body cavities) of inmates who choose to engage in planned contact visits with outside visitors that were only loosely supervised by officers. Officials of the federal Metropolitan Correctional Center (MCC) adopted that policy because the visit could be planned in order to smuggle contraband into the facility.

This Court rejected the lower courts' ruling that such searches always require individualized suspicion and cannot "*ever* be conducted on less than probable cause." 441 U.S. at 560 (emphasis in original). It reasoned that the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. That inquiry requires "consider[ing] the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

The Court did "not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. But on the other hand, the Court recognized that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* at 559. Contact visits presented an obvious opportunity to "attempt[] to secrete these items into the facility." *Id.* Although the record of smuggling during contact visits was not extensive, the Court explained "that may be more a

testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Id.*

The two central factors that animated this Court's assessment of the Fourth Amendment inquiry in *Bell* – the degree of the "intrusion" on privacy and "the justification for initiating it, *id.* – produce a different result in this case. The inmates' in *Bell* had a lessened expectation of privacy because they had no constitutional right to engage in contact visits. *Block v. Rutherford*, 468 U.S. 576 (1984); *see also Overton v. Bazzetta*, 539 U.S. 126 (2003). The inmates thus elected to exercise the privilege (not the right) "to receive visitors and to enjoy physical contact with them" under the conditions stated by the facility. *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (citations and internal quotations omitted), *cert. denied*, 537 U.S. 1083 (2002). Arrestees such as petitioner, by contrast, make no such choice.

Conversely, the government's interest in conducting the search was far greater in *Bell* than in this case because the policy challenged in *Bell* addressed a far greater risk of smuggling, and did so more effectively. As the United States explained in *Bell*, loosely supervised contact visits present a "unique opportunity" for smuggling because inmates could coordinate the direct transfer of contraband from an outside visitor. U.S. Br. 72, 1978 WL 207132. That prospect is well established and as such need not be repeatedly proven in court. *E.g.*, *Block v. Rutherford*, 468 U.S. 576, 586 (1984) (visitors can "easily" conceal contraband and pass it to inmates during contact visits "unnoticed by even the

most vigilant observer"); U.S. Bureau of Prisons, *Searching and Detaining or Arresting Non-Inmates*, 72 Fed. Reg. 31,178 (June 6, 2007) (Bureau of Prisons has found that "delivery of illicit substances while visiting is a common method for such substances to be introduced into institutions").

The Third Circuit reached the opposite conclusion by quoting the district court's conclusion in *Bell* that the contact visits in that case did not present a realistic opportunity for smuggling because "inmates and their visitors [were] in full view." Pet. App. 24a (quoting *Wolfish v. Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977)). But this Court accepted the representation of the United States that the district court was incorrect, *see* U.S. Br. 72-73 & n.54, 1978 WL 207132, and decided the case on that basis: "MCC officials [had] adopted the visual inspection procedure as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy that these visits are intended to afford." 441 U.S. at 560 n.40. In these circumstances, the government explained, contact visits presented a "unique" risk, *Bell* Pet. Br. 72, and the record in *Bell* documented instances of smuggling, *see Bell* J.A. 74-77, 86-87.

"As a matter of common sense, contact visits are far more likely to lead to smuggling than initial arrests," *Bull*, 595 F.3d at 998 (Thomas, J., dissenting), because "arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something," *Shain*, 273 F.3d at 64. As the dissent below explained, it is intuitively implausible that with any regularity "individuals would deliberately commit minor offenses such as

civil contempt – the offense for which Florence was arrested – and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries." Pet. App. 31a n.1.

Finally, this Court found the absence of significant evidence of smuggling during contact visits in *Bell* unsurprising, given that the challenged policy deterred such efforts. 441 U.S. at 559. By contrast, if respondents were correct that suspicionless strip searches are necessary to deter the smuggling of contraband into jails, there would be evidence of that fact from other facilities around the country in which that practice has been banned for decades. Smuggling by arrestees is already deterred by the jails' ordinary use of pat-down searches and (for metallic items) metal detectors, as well the prospect that circumstances will give rise to reasonable suspicion justifying a strip search. The consequences of detection are moreover severe, as the would-be smuggler will face significant criminal charges. *See* N.J. Stat. Ann. § 2C:29-6.[13] In contrast

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[13] *See also, e.g.*, 18 U.S.C. § 1791 (providing or possessing contraband in federal prison can be punished by up to twenty years in prison); Tenn. Code Ann. §§ 39-16-201, 40-35-111 (introducing weapons or drugs into penal institution punishable by up to fifteen years in prison); Iowa Code Ann. §§ 719.7, 902.9 (possessing dangerous weapon in jail punishable by up to ten years in prison and possessing all other contraband punishable by up to five years); Ky. Rev. Stat. §§ 520.050, 532.020 (introducing contraband is a felony punishable by up to five years in prison).

to *Bell*, the practices at issue in this case add little or no additional deterrent value, given that any member of the public who inquired would learn that New Jersey law and the jails' own policies both formally prohibit suspicionless strip searches.

Bell thus provides no justification for respondents' failure to submit evidence supporting their counter-intuitive claim that suspicionless strip searches materially aid in detecting and deterring the introduction of contraband into jails. Courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners." *Plata*, *supra* (slip op. at 13). The judgment accordingly should be reversed.[14]

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[14] For the reasons given in the text, suspicionless strip searches are unconstitutional even under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). There is no substantial justification for strip-searching all detainees. Under the *Turner* standard, this Court inquires whether the government "shows more than simply a logical relation [to the regulation's aims], that is, whether [it] shows a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) (emphasis in original). "[R]estrictive prison regulations are permissible if they are 'reasonably related to legitimate penological interests,' and are not an 'exaggerated response' to such objectives." *Id.* at 528 (quoting *Turner*, 482 U.S. at 87). *Turner* also requires that prison regulations be targeted to an appropriate subset of the prison population. Thus, the policy restricting prisoners' access to reading materials challenged in *Beard*, 548 U.S. at 524-25, 530, applied only "to a group of specially dangerous and recalcitrant inmates" amounting to "about 0.01 percent of the total

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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prison population." At oral argument, the United States as *amicus curiae* acknowledged that the policy "wouldn't pass" the *Turner* test if applied "across the board to the general population." Tr. of Oral Arg. 27 (No. 04-1479); *see also Overton*, 539 U.S. at 130 (challenged policy applied only to inmates "classified as the highest security risks").

RESPONDENT'S BRIEF

No. 10-945

IN THE

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ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

The District Court for the District of New Jersey certified the following question to the Court of Appeals for the Third Circuit: "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment?" The Court of Appeals restated the question as "whether it is constitutional for jails to strip search arrestees upon their admission to the general population?"

[Pet. App. 1a; 46a].

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STATEMENT OF THE CASE

1. On March 3, 2005, April Florence was driving down I-295 in Burlington County, New Jersey, when she and her husband noticed that a state trooper was right behind them [J.A. 246a]. Mrs. Florence pulled off the highway and the police car followed. A mile later, when the state trooper put on his lights, Mrs.

Florence pulled over, handed the officer her license, registration, and insurance card, and presumably expected to be given either a warning or citation of some sort [*id.* at 246a-247a].[1] Instead, the officer returned and asked who owned the car [*id.* at 247a]. When Mrs. Florence identified her husband, Albert Florence, as the owner, the state trooper asked Mr. Florence to accompany him to the police car and then placed him under arrest [*id.* at 247a-248a]. Mrs. Florence was not arrested.

2. The state trooper arrested Mr. Florence that night because there was an outstanding warrant for Mr. Florence's arrest that had been issued in Essex County, New Jersey [J.A. 391a]. In accordance with settled New Jersey practice regarding outstanding arrest warrants, the state trooper took Mr. Florence first to State Police barracks for booking and then to the Burlington County Detention Center to be detained until the Essex County authorities picked him up.[2] The Detention Center, located in Mount Holly, is one of two correctional facilities operated by

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[1] Most such encounters result in the issuance of a ticket (i.e., a summons) and the immediate release of the driver.

[2] Arrested persons are taken to the police station (as Mr. Florence was taken to the barracks), but they are transported to a jail if, and only if, one of the following is true: (1) the charge is one of certain categories of crimes; (2) the arrestee had failed to appear when served with a summons; (3) there is reason to believe that the arrestee is dangerous to self, other persons, or property; (4) there is an outstanding warrant for the arrestee; (5) the identity or address of the arrestee is unknown or (6) there is reason to believe that the arrestee would not appear on a summons. N.J. Court Rule 3:3-1(c). If none of these five categories applies, the person is issued a summons at the station house and released. *Id.* This case, of course, qualified under the fourth category.

Burlington County. The other is the Correction Work Release Center in Pemberton. The Work Release Center houses females and some first-time male offenders who work outside the facility during the day. It is much smaller than the Detention Center, which houses approximately 450 inmates at any one time, all of them male.

The only jail about which Mr. Florence adduced facts in the district court was the Detention Center. Nevertheless, his class list includes persons arrested and committed to either facility between March 2003 and March 2007. The district court estimated from the records of commitments by date that the class from Burlington County might consist of 3900 non-indictable detainees (a number that somewhat overstates the number of persons in the class because some class members were arrested more than once during the class period) [J.A. 20a-21a]. By way of comparison, in 2004 – the most recent year for which the statistics are reported statewide – Burlington County had 18,147 non-traffic arrests of adults. State of N.J., Div. of State Police, Uniform Crime Report: State of New Jersey 2004 at 56, *available at* http://www.state.nj.us/njsp/info/ucr2004/pdf/2004_ucr_whole.pdf.

3. Mr. Florence spends quite a bit of his brief complaining about his arrest, angered because the judgment giving rise to his arrest warrant and subsequent incarceration had actually been satisfied shortly after the warrant was issued in April of 2003 [J.A. 85a]. But the State Police did not know that. The warrant still appeared on the computer as a valid and outstanding arrest warrant for a charge identified as "Hinder Prosecution." It was accompanied by an instruction "to the Sheriff of Essex County or any

law enforcement officer in New Jersey: You are ordered to take into custody the above defendant . . . and bring him/her before the Superior Court" in Essex County, and it had been duly signed by a Judge of the Essex County Superior Court on April 25, 2003 [*id.* at 89a-90a].[3] Of course, both the arresting officer and the Burlington County Detention Center had the right to rely on the accuracy of the warrant reporting system, a point that is not at issue here in any event, because Mr. Florence (and the class he represents) are not challenging New Jersey's practice of arrest and detention of persons with outstanding arrest warrants or, for that matter, the State's practices with respect to the maintenance or updating of warrant reporting. *Cf., Herring v. United States*, 555 U.S. 135, 146-47 (2009). There is no evidence in the record

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[3] That warrant in turn arose from an incident in 1998, when – by his own account – Mr. Florence was stopped while driving a vehicle he did not own [J.A. 26a; 239a]. Rather than remain at the scene, he fled [*id.* at 239a]. He was subsequently arrested by the Maplewood police and charged with obstruction of justice, aggravated assault, and possession of a deadly weapon [*id.* at 241a-242a; 261a, 393a]. The district court found that most – if not all – of the originally charged offenses were indictable crimes, and that the two charges to which Mr. Florence pleaded guilty (hindering prosecution in violation of N.J. Stat. Ann. § 2C:29-3 and obstructing the administration of law in violation of N.J. Stat. Ann. § 2C:29-1) likewise appeared to have been indictable [J.A. 26a]. Nevertheless, Mr. Florence failed to make the agreed-upon monthly payments on the resulting $1574 fine; indeed between November 1999 and March 2003, he made only five payments (each for $50 or less) [*id.* at 85a]. Confronted with Mr. Florence's refusal to comply with the terms of his plea, the Honorable Joseph A. Falcone of Essex County issued a warrant for Mr. Florence's arrest in April of 2003 [*id.* at 89a-90a; *see also id.* at 81a, 85a]. Mr. Florence paid the entire balance less than a week later [*id.* at 85a].

that any class member other than Mr. Florence experienced any irregularity in the issuance or execution of an arrest warrant.

4. As part of the Burlington County Detention Center intake procedure and before he was placed among other inmates, Mr. Florence was "kwelled" – a term of art describing the process whereby a new detainee was taken to a shower and, with no one present except a single same-sex corrections officer, was given delousing lotion (Kwell), and was supervised to ensure that the Kwell was applied properly. Ten minutes after the Kwell had been applied, the new inmate was instructed to shower with warm, soapy water. Prior to having a new inmate shower, a corrections officer would observe him to see if there were any gang tattoos or evident signs of injury or illness and, of course, to look for any contraband. Under the intake procedures then in effect, if the corrections officer concluded that a given inmate should be subjected to a more rigorous search, he would mark the intake form to record that that inmate had been "strip searched" and would note the circumstances that led him to conduct the more intensive examination. The form that was filled out in Mr. Florence's case shows that he was "kwelled," but that he was not strip searched (as that term was used and understood by County personnel) [J.A. 390a].[4] Instead, the County referred to the

[4] The description in Mr. Florence's brief (at 5) – taken from his own deposition testimony – suggests that the process was more intrusive than that testified to by any of the Burlington County officers. Haywood Reeder, for example, testified that he gives an inmate Kwell and observes him while he is undressing to take the shower, makes sure that the inmate applies the Kwell, and checks for scars and marks. He also testified that he instructs every officer to conduct the process in the same way

inspection that was done as a matter of course prior to giving each new inmate Kwell as a "visual observation," not a "strip search."

5. While a person arrested pursuant to a warrant ordinarily would appear before a judge shortly thereafter for the setting of bail in accordance with N.J. Court Rule 3:4-1(b), in Mr. Florence's case the warrant had been issued by an Essex County Judge. Accordingly, the Burlington County Detention Center was obliged to house Mr. Florence until the Essex County authorities picked him up and transported him to the Essex County Correctional Facility in Newark, roughly 70 miles to the north. When Essex County officers brought him before a judge there, a week after his initial arrest, Mr. Florence was able to

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[J.A. 183a-186a]. Charles Palmer likewise testified that he stands with the new inmate while the inmate undresses "[j]ust in case they have anything else on them or anything we actually go through the clothes and make sure nothing else is on them. Make sure nothing gets into the jail . . ." [J.A. 218a-220a; *see also id.* at 116a-118a; 161a-166a; 230a-231a; 234a]. Of course, even according to Mr. Florence's version – and as his intake form confirms – he was never touched or asked to squat [*Compare* Florence Br. at 5 *with* J.A. 9a-13a]. In any event, the district court did not resolve whatever factual dispute may be said to exist, and the Court of Appeals agreed with the district court's conclusion that the factual dispute did not need to be resolved in order to address the legality of the intake process. 621 F.3d 296 (3d Cir. 2010) [Pet. App. 1a-32a, at 6a]. Both the district court and the Court of Appeals recognized that in seeking to represent the class of persons "strip searched" Mr. Florence limited his allegations to those of what the district court considered a "strip search." [J.A. 23a n.5; *see also* Pet. App. 5a n.1]. Finally, even if the disputed assertions made in Mr. Florence's brief were to be accepted as fact, he has still alleged a procedure less intrusive than that at issue in *Bell*, and the Court below affirmed the counties' procedures even given the facts Mr. Florence alleged.

demonstrate that the original judgment had been satisfied and that the outstanding warrant should not have remained open. He was then released.[5]

6. Mr. Florence then brought this suit against both Burlington County and Essex County, averring that:

> The Fourth Amendment of the United States Constitution prohibits state officials, such as the Defendants in this action and the employees they supervise, from performing blanket strip searches of arrestees who have been charged with misdemeanors or other minor crimes or violations and/or detainees as holdovers on warrants from other jurisdictions unless there exists a reasonable suspicion to believe that the arrestee/detainee is concealing a weapon or contraband

[Amended Compl., Dist. Ct. Dkt. 24 at ¶ 57]. His class allegations, however, referred only to "commitment" – i.e., to those persons who were to remain in the custody of the Burlington County Detention Center until released [*id.* at ¶ 39].

At class certification, the Honorable Joseph Rodriguez of the District Court for the District of New Jersey recognized that the class definition in the Amended Complaint "technically excluded" Mr. Florence from his own class, because Mr. Florence's class definition had not included holdovers [J.A. 25a n.6] – i.e., those persons being held pending transfer to another jurisdiction. He therefore modified the definition of the class to read:

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[5] Some detainees stay at the Detention Center over six months, while others are transferred or released in a matter of days. The average time a detainee remained at the Detention Center in 2010 was just shy of one month.

> All arrestees charged with non-indictable offenses[6] who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons

[*id.* at 43a].[7] The district court concluded that because the detainees at issue here were observed while

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[6] Under New Jersey law, a non-indictable offense is an offense that provides for imprisonment of six months or less, whether or not a fine is also provided for. *See* N.J. Stat. Ann. § 2C:1-4.

[7] Mr. Florence's brief includes some incorrect and misleading statements about the members of the class. Burlington County provided two reports to the plaintiffs, one of which contained a list of individuals processed for non-indictable offenses, and one of which contained a list of all individuals detained by Burlington County [*See* Dist. Ct. Dkt. 67]. It is true that some of the offenses discussed by Mr. Florence in his brief – such as improper riding of a bike, lack of audible signals, and a noisy muffler – appear on the latter (all persons jailed) list, but those offenses are listed *only in conjunction with other offenses or outstanding warrants*. One of the persons on the latter list, for example, Commit No. xxx191C, had two arrests listing violations for "no audible signals." Those arrests were both based on multiple offenses, however: on one arrest he also had an outstanding warrant for non-support, and on the other he also had multiple outstanding contempt of court warrants. Moreover, at the time of those arrests, Commit No. xxx191C had been previously arrested for both controlled substance and weapons violations, and during the class period alone he was arrested six times. It is thus not surprising that, while Commit No. xxx191C appears on the list of persons in the jail, he does not appear

naked, that absence of clothing rendered the observation of those detainees a strip search, without regard to the terminology the County used [Pet. App. 65a].[8]

By defining the class in that manner, the district court appeared to recognize a broad class that included both inmates who had been "visually observed" as a part of the kwelling process and those who had been subjected to more intensive searches.[9] But by excluding from the class all instances in which corrections officers had articulated a reasonable suspicion for a strip search, the district court effectively defined a class consisting *only* of persons who were visually observed, because, as discussed above, whenever an officer determined that a strip search or visual body cavity search was warranted, he marked the form accordingly, and stated the reasons. Only

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on the list of class members. For that matter, notwithstanding the representations in Mr. Florence's brief, no one on Burlington County's class list was committed to the Detention Center because of improper riding of a bike or lack of audible signals. All such persons appeared only on the more comprehensive list.

[8] Contrary to Mr. Florence's characterization, Burlington County did not "abandon" the distinction it drew; it merely defended its practice as constitutional – whether that practice was labeled a "strip search" or referred to by its proper designation of "visual observation" [*Compare* Florence Br. at 8 *with* Joint 3d Cir. Br. (Burlington Argument) at 7, 8, 17]. Burlington County has consistently maintained – and maintains here – that the intake procedures used at the time Mr. Florence was incarcerated were constitutional without regard to the words the district court used to describe them.

[9] In using the terms they used, the officers were merely echoing then-N.J. Admin. Code 10A:31-1.3 (2005) ("'Strip Search' means a thorough and systematic examination of an unclothed person's body and orifices, including visual inspection of external genital and anal areas, as well as the person's clothing and all personal possessions."); [*see also* Pet. App. 5a n.2].

the forms filled out for Mr. Florence and the class (Mr. Florence's appears at [J.A. 390a]) would have no reason identified – because they were all marked "not strip searched" and were instead marked "individual was showered, kwelled, and visual observation was made for recent injuries" [*id.*].

7. The district court later ruled, in response to cross-motions for partial summary judgment, that the intake process at issue here violated the Fourth Amendment of the United States Constitution as a matter of law. 595 F. Supp. 2d 492 (D.N.J. 2009) [Pet. App. 48a-100a, at 87a]. The defendants asked that the district court certify an appeal to the Court of Appeals for the Third Circuit [Dist. Ct. Dkt. 165, 166, 167]. Over the plaintiff's opposition, the district court certified the appeal at 657 F. Supp 2d 504 (D.N.J. 2009) [Pet. App. 35a-47a], and the Court of Appeals heard it. The panel – with the Honorable Judges Thomas Hardiman and Dolores Sloviter in the majority and Louis Pollak (sitting by designation) in dissent – reversed the district court and decided (in accord with the en banc decisions of the Courts of Appeals for the Ninth and Eleventh Circuits) that "the security risk was defined by the fact of detention in a correctional facility" and that individualized suspicion was not necessary for the procedures in question. 621 F.3d 296 (3d Cir. 2010) [Pet. App. 1a-32a, at 22a-23a].[10]

8. Mr. Florence asked this Court to grant certiorari to consider a somewhat broader question than the

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[10] The Court of Appeals cited in support its earlier opinion in *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) ("[I]t is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security.") [Pet. App. 22a].

question addressed by the Court of Appeals [*Compare* Pet. App. 1a ("This interlocutory appeal requires us to decide whether it is constitutional for jails to strip search arrestees upon their admission to the general population") *with* Florence Br. at i ("Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances")]. In point of fact, the Court of Appeals never held that everyone who is placed under arrest – no matter where or under what circumstances – can be strip searched. Nor has Burlington County ever contended that it could strip search every individual arrested for every minor offense. Under New Jersey Court Rules, most persons arrested for minor offenses are given a summons and released. Those persons, and persons who post bail, typically are not confronted with any searches at all. The practice that Mr. Florence and the class have challenged in this case is Burlington County's procedure of delousing and observing every new detainee upon his intake into the Burlington County Detention Center. That was the practice the Court of Appeals considered and upheld, and it is the practice that Burlington County defends as constitutional here.

SUMMARY OF THE ARGUMENT

This Court decided *Bell v. Wolfish*, 441 U.S. 520 (1979) over three decades ago. Since then, the case has been cited over 11,000 times. Almost all of those citing the case agree that in *Bell* the Court articulated a balancing test, weighing a plaintiff's privacy interest against the institutional interest to ascertain whether a plaintiff has set forth a constitutional violation. This Court has decided other cases since, and those cases in no way undermine the holding of

Bell. Instead, the cases flesh out what "institutional interests" mean in the context of a jail – and what a prisoner's "privacy" means in that same context. In following these precedents, what the Court of Appeals for the Third Circuit did in this case was unremarkable. In point of fact, the holdings of this Court have been so consistent in their recognition of the hazards and challenges that jail administrators face, and the concomitant deference that is due to the administrators who are seeking to address those challenges, that Mr. Florence seeks to align himself with persons stopped and searched while driving down a highway. But he was not searched on a highway. He was searched in jail. And that fact is of critical importance in defining the proper constitutional analysis to apply here.

ARGUMENT

I. JAILS ARE NOT FOURTH AMENDMENT PROTECTED SPACES AND THE PERSONS WITHIN THEM HAVE LIMITED OR NO FOURTH AMENDMENT RIGHTS.

This Court has repeatedly and flatly rejected the idea that prisoners possess the "ordinary citizen" privacy interest that Mr. Florence advocates. In *Lanza v. New York*, 370 U.S. 139 (1962), a case that preceded *Bell* by almost two decades, the Court had the opportunity to address whether a wiretapped conversation in a jail visiting room "was a violation of those principles of the Fourth Amendment which have found recognition in the Due Process Clause of the Fourteenth." *Id.* at 141. The Court dismissed the notion (which it called "at best . . . novel") that a jail was a constitutionally protected area. While recognizing that the Court has been generous in con-

struing Fourth Amendment protection, extending it to business offices, stores, hotel rooms and automobiles, the Court went on to say that "it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id.* at 143. The Court quoted this very language twenty years later in *Hudson v. Palmer*, 468 U.S. 517 (1984), when it concluded that a "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id.* at 527-28. In other words, it has long been settled in this Court that neither a prisoner nor the cell that person occupies has an "ordinary" right of privacy.

Mr. Florence does not discuss these holdings. Instead, he tries to draw a distinction between "arrestees" and persons who have been convicted [*See* Florence Br. at 19].[11] But the class at issue here was not merely arrested; each person in the class was also jailed. And this Court has expressly stated that when a person is in jail, the line between pretrial detainees and convicts is drawn only by virtue of Eighth Amendment constraints, necessary because

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[11] He also contends that there is a distinction between persons who are charged with "indictable" offenses and those who are charged with "non-indictable" offenses, a difference that he finds meaningful based on his insistence that the sole purpose of the "search" is to detect contraband, and his assumption that those who are accused of committing "non-indictable" offenses are less likely to attempt to bring contraband to jail than those who are accused of committing indictable offenses. As explained *infra*, the institutional interests at issue here extend beyond the interception of contraband. Moreover, Mr. Florence presented no evidence that persons accused of non-indictable offenses posed less of a risk than those accused of indictable offenses.

the state cannot "punish" a person until he or she has been found guilty. *Bell*, 441 U.S. at 537 n.16. Mr. Florence has not alleged, on behalf of his class, that the intake process at the Burlington County Detention Center was "punishment." Accordingly, under *Bell*, what Mr. Florence and his class are challenging is a condition of confinement for a class much like *Bell*'s.[12] *Id.*

In *Bell*, the district court had differentiated between the rights of pretrial detainees and the rights of convicted prisoners. The Court of Appeals for the Second Circuit had affirmed that distinction in part, relying heavily upon the ground that pretrial detainees are "presumed to be innocent." *Id.* at 528, 532. This Court, however, held that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533. Moreover, *Bell*, like this case, did not present the question whether the plaintiff was properly detained (a question that the Court had previously answered in *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)):

> The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legiti-

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[12] In considering whether the practice of visual body cavity searches following visitation was constitutional, the Court in *Bell* reserved the question whether the Fourth Amendment even applied. 441 U.S. at 558 ("However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable" (internal citations omitted).)

> mate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

Bell, 441 U.S. at 540. As a consequence, the Court held that the visual body cavity searches were justified and constitutional.

Certainly, as Mr. Florence stresses, the Court recognized that the practice at issue in *Bell* – visual body cavity searches – was humiliating and intrusive. In recognition of that fact, Burlington County's practice at the time of Mr. Florence's arrest was that even strip searches as defined by then-N.J. Admin. Code 10A:31-1.3 (2005), discussed *supra* at n.9, were per-

formed only if there was a particular reason to do so. The practice that is at issue here – visually observing a new detainee during kwelling – was the only practice that was followed during all intakes. In upholding that practice, the Court of Appeals recognized that it was brief in duration, conducted in private, and less intrusive than the practices at issue in *Bell* [Pet. App. 19a-20a]. These factors were the ones identified as significant in *Bell* itself: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." 441 U.S. at 559.

With all due respect, Mr. Florence's overgeneralization of "strip searches" fails to distinguish the actual practice at issue here from more intrusive, more public, or apparently gratuitous procedures. But those distinctions are important. Just as jails are distinct from backyards and summonses are different from warrants, a private visual observation preceding a delousing shower is distinct from all sorts of more humiliating procedures. *Cf.*, *Campbell v. Miller*, 499 F.3d 711 (7th Cir. 2007) (reviewing a search in an "open" backyard of a defendant who was issued a citation at the time and released); *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (upholding procedures to address an unruly arrestee but finding that leaving the woman restrained and naked for an extended period violated her right to privacy). The mere fact that a number of these procedures included disrobing does not render them interchangeable for purposes of the *Bell* analysis.

Moreover, *Bell* is not the Court's last word on this point. That decision was followed a few years later by *Hudson*, *supra*, and by *Block v. Rutherford*, 468 U.S. 576 (1984). Although *Block* has quite a bit to

say about the issues Mr. Florence has raised, he cites that case at only two places in his brief (pages 12 and 37), suggesting both times that the lack of a constitutional right to contact visits diminished the petitioners' privacy interests. Mr. Florence is incorrect in that regard.[13] What diminished the prisoners' privacy interests was the fact that they were in jail.

In *Hudson*, the Court reaffirmed that jails and prisons are not Fourth Amendment protected spaces and that the rights of inmates are obviously circumscribed by the nature of incarceration. Thus, the Court's recognition that prisons are not "beyond the reach of the Constitution" was qualified:

> [W]hile persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights. These constraints on inmates, and in some cases the complete withdrawal of certain rights, are "justified by the considerations underlying our penal system." The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of "institutional needs and objec-

[13] It is not at all clear that the Court was rejecting the constitutional significance of the right at issue in *Block*. When the Court in *Turner v. Safley*, 482 U.S. 78, 96 (1987) weighed the restrictions at issue there against the "constitutionally protected marital relationship in the prison context," it was weighing a (different) restraint on the same class of rights. And although the majority in *Block* found that precluding contact visits was a reasonable restraint, the dissent would have required a stronger showing than was made in *Bell* to justify the restraint because the right to "enter into, maintain, and cultivate familial relations [that] is entitled to constitutional protection" impinged on a fundamental right while the practices challenged in *Bell* did not. *Block*, 468 U.S. at 599.

> tives" of prison facilities, chief among which is internal security.

468 U.S. at 524, *citing*, inter alia, *Bell*.

Turning specifically to whether a person in prison can have a "justifiable," "reasonable," or "legitimate" expectation of privacy in his cell, the *Hudson* Court concluded:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.
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> * * *
>
> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[loss] of freedom of choice and privacy are inherent incidents of confinement."

Id. at 525-26, 527-28, *quoting in part Bell*, 441 U.S. at 537. Of particular importance here, *Hudson* draws no constitutional distinction between "close and continual surveillance of inmates" and the "close and

continual surveillance of . . . their cells." 468 U.S. at 527.

Hudson's holding that prisoners have no reasonable expectation of privacy was expressly reiterated by this Court in *Samson v. California*, 547 U.S. 843, 848 (2006). In *Samson*, the Court defined the privacy interests of *parolees* – even though parolees are no longer within the confines of the institution itself – by reference to institutional needs. Moreover, the Court rejected as "misplaced" Mr. Samson's insistence (similar to Mr. Florence's) that the constitutional adequacy or infirmity of one state's policies is apparent from an examination of the practices of other jurisdictions. "That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California's supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy." *Id.* at 855. If a person who has left a penal institution carries with him a diminished expectation of privacy, how much less sense would it make to hold that a person who is entering a penal institution is entitled to an undiminished expectation of privacy?[14]

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[14] As the Court of Appeals for the Eleventh Circuit found in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), there is no "serious dispute" that inmates of the same sex may be required to shower together and that guards of that sex may watch them while they are showering to prevent any misconduct. *Id.* at 1313 n.6, *citing Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002); *Johnson v. Phelan*, 69 F.3d 144, 145-46 (7th Cir. 1995) and *Timm v. Gunter*, 917 F.2d 1093, 1101-02 (8th Cir. 1990). Mr. Florence cites several cases in support of his "circuit split" that do not focus on *inmates* but were instead decided in the context of a person who – although he or she might be

The *Lanza-Bell-Hudson* cases, taken together, stand for the proposition that conditions in jail simply do not raise Fourth Amendment questions, and that while there are other constitutional protections that prisoners retain, the Fourth Amendment is not among them. But even if one were to argue that those cases do not reach that far, they stand at least for the proposition that any limited Fourth Amendment rights that may remain are secondary to institutional security. In any case, it is safe to say that what one *cannot* conclude under these cases is that the expectation of privacy in jail is the same as the expectation of privacy that a citizen has while living at home, driving an automobile, or attending school. Yet that foreclosed conclusion is exactly the argument that pervades Mr. Florence's (and his amici's) briefs.

Even in those Courts of Appeals that Mr. Florence views as supportive of his position, it is widely recognized that once a person has been confined (or, in the alternative, convicted but released), privacy interests are severely limited. *E.g.*, *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) ("With the person's loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment"); *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (rejecting plaintiff's equal protection claim where female guards

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placed under arrest – was to be released right away. *See, e.g.*, *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) ("In this case, it is undisputed that plaintiffs were arrested for minor traffic violations and were awaiting bail . . . ."); *Stewart v. Lubbock Cnty.*, 767 F.2d 153, 158 n.1 (5th Cir. 1985) (dissent: "For example, I have no doubt that it is not unreasonable to strip search minor offenders when, due to overcrowding, they must be placed temporarily with the more serious offenders").

observed male inmates in showers and bathrooms; while plaintiff could claim a privacy right under either the Fourth or Fourteenth Amendments, "[p]risoners retain, at best, a very minimal Fourth Amendment interest in privacy after incarceration"). Because none of those cases provides him any help, Mr. Florence turns to cases weighing the intrusiveness of warrantless searches against the privacy rights of a person who is going about the business of one's daily life, cases such as *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (schoolchild); *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing of candidates); and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (drug testing of certain railway employees).

Moreover, even if one were looking to the cases on which Mr. Florence relies for guidance, they support the proposition that when a rule of general application is adopted in furtherance of an institutional interest, individualized suspicion is not required. In such cases, the Court has substituted an evaluation of the institutional interests giving rise to the policy for the objective analysis attendant upon individually targeted searches. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080-81 (2011), *citing Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding drug testing against the reduced privacy expectation of student athletes); *Skinner*, 489 U.S. at 620 (same for Government's interest in regulating the conduct of railroad employees to ensure safety). In the jail context, institutional interests assume even more importance, because a student athlete or a railroad employee (or, for that matter, anyone who chooses to fly), has chosen that activity, and because of the benefit of participation has an independent incentive to comply with the rules, while an inmate has been

brought to jail precisely because he is suspected of (or has been convicted of) violating the law.

Other cases, such as *Safford*, are even less apposite, because they concern the level of suspicion required when an institution has singled out an individual for a search. It is only in those situations that reasonable suspicion is required. Even so, the searches in those cases were not motivated by law enforcement goals, and the Fourth Amendment analysis "requires some modification of the level of suspicion of illicit activity needed to justify a search," making probable cause unnecessary.[15] 129 S. Ct. at 2639, *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

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[15] Of course, Mr. Florence also relies on cases that discuss the extent to which and when law enforcement can initiate individually targeted warrantless searches for law enforcement purposes. *See Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk), *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (automobile search), *Thornton v. United States*, 541 U.S. 615 (2004) (same), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (narcotics stop); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (airport questioning of traveler). The Former Attorneys General of New Jersey (in a brief drafted by the American Civil Liberties Union) suggest that the Court ought to find that officers are specially trained to make individualized suspicion determinations and "'make inferences from and deductions about the cumulative information available' and 'draw on their own experience and specialized training' to analyze factors that 'might well elude an untrained person.'" Amicus Br. at 14, *quoting United States v. Arvizu*, 534 U.S. 266, 273 (2002). That quote, of course, is from this Court's consideration of the deference due to a border patrol officer who decides whether to stop a suspicious vehicle for further investigation. The former Attorneys General thus ask this Court to apply the quintessential law enforcement warrantless search standard, even though the officers whose conduct is at issue here are not in the field deciding the proper scope of an investigation but are, instead, admitting inmates to jail.

II. THIS COURT HAS REPEATEDLY RECOGNIZED THE INSTITUTIONAL INTERESTS AT ISSUE HERE.

A. Jail Administrators Are Owed Considerable Deference in Determining How to Protect Inmates and Employees.

This Court has persistently emphasized that jail administrators understand and can better respond to the needs of the persons under their care than litigants (or courts) can. In *Bell*, this Court discussed not only the diminished privacy interests set forth above, but also the heightened institutional interests of the jail.

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[Central] to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

441 U.S. at 546-47 (internal citations omitted). The Court went on to say:

> Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-

> to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 547-48 (internal citations omitted). It was only after establishing this framework that the Court considered the specific complaints of the inmates. In rejecting the holding by the Court of Appeals that inmates had to be allowed to receive food packages, the Court observed, "Certainly, the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." *Id.* at 554. It also found that visual body cavity searches were both non-punitive and war-

ranted by the security needs of the institution. *Id.* at 560-61.

When the Court decided *Block* it reiterated the same principles: "[C]ondition[s] or restriction[s] of pretrial detention" are weighed against the institutional interests being protected to ensure that the conditions or restrictions are non-punitive and the institutional interests legitimate. 468 U.S. at 584. In striking that balance, courts ask whether the challenged restriction is "reasonably related to a legitimate governmental objective" or is "arbitrary or purposeless." *Id.* Even Mr. Florence has not suggested that the limited and uniform policy at issue here was "arbitrary or purposeless." Moreover, the *Block* Court went on to stress – as the Court had said in *Bell* (and even earlier in *Pell v. Procunier*, 417 U.S. 817, 827 (1974)) – that courts should play a "very limited role" in "the administration of detention facilities" because the administrative considerations are "peculiarly within the province and professional expertise of corrections officials" and, absent "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters." *Block*, 468 U.S. at 584-85 (internal quotations and citations omitted). As a result, the Court concluded that a complete prohibition on contact visits for even the most minor offenders was an "entirely reasonable, nonpunitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment." *Id.* at 588.

1. *Turner* Establishes a Proper Framework in Which to View the Institutional Interests.

The analysis in *Bell* and *Block* set forth the principles used in weighing institutional interests against an inmate's asserted rights. Accordingly, when the Court decided *Turner v. Safley*, 482 U.S. 78 (1987), it was reaffirming an already-established principle:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. at 89. Moreover, this Court subsequently decided *Washington v. Harper*, 494 U.S. 210 (1990), in which it said: "We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id.* at 224, *citing Turner*, 482 U.S. at 85.

Given this Court's statements, it is surprising that Mr. Florence does not advance a supported argument on why he thinks the procedure at issue here fails the *Turner* test. Instead, in his final footnote, he says only: "For the reasons given in the text, suspicionless strip searches are unconstitutional even under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). There is no substantial justification for strip-searching all detainees" [Florence Br. at 40 n.14]. This conclusory averment neither addresses the rea-

sons that the County articulated in support of its policy nor accounts for the costs that the County demonstrated it would have to bear – not just administratively but in terms of reduced protection of its personnel and inmates – in order to accommodate Mr. Florence. It follows that Mr. Florence's dissatisfaction is not evidence sufficient to disprove the validity of the procedures the County put into place. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.")

As set forth *infra*, the threats Burlington County seeks to protect against are real and serious, and the adoption of a procedure to address these challenges is both legitimate and non-punitive. The alternatives Mr. Florence proposed in the district court – such as purchasing BOSS chairs – would be costly for the County to implement, and even if they might detect some contraband, they are designed only to detect metal,[16] and they do nothing at all to protect against lice infestations, Methicillin-resistant Staphylococcus aureus ("MRSA") or other infectious diseases, or gang violence.

Under *Turner*, the Court applies four factors to measure the reasonableness of a regulation. 482 U.S. at 89. First, there must be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* Second, courts may ask "whether there are alternative means of exercising the right that remain

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[16] According to the BOSS promotional materials posted at http://www.bodyorificescanner.com/, magnetic field sensors trigger an alarm when metal is detected.

open to prison inmates." *Id.* at 90. Third, the court considers the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.*[17] Fourth, and finally, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91. As Burlington County explained in its brief to the Court of Appeals, the application of *Turner* to uphold segregating gang members implicated the same institutional concerns – and called for the same deference – that an attempt to identify gang affiliation upon intake did [*See* Joint 3d Cir. Br. (Burlington argument) at 15, discussing *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002)].

In applying *Turner* to uphold similar intake procedures employed by the City and County of San Francisco, the en banc Court of Appeals for the Ninth Circuit held in part:

> The reasonableness of a search is determined by reference to its context. The search policy before us applied to arrestees transferred out of holding cells and introduced into the general jail population for custodial housing. According to San Francisco's unrebutted testimony, the purpose of the strip search policy was to prevent the smug-

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[17] Under the third *Turner* factor, this Court has said that deference is particularly important when "the right in question 'can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.'" *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989) (excluded publications).

> gling of drugs, weapons, and other contraband into the general jail population. Because the purpose of the search policy at issue was to further institutional security goals within a detention facility, the principles articulated in *Bell v. Wolfish* and *Turner v. Safley* govern our analysis. Cases that address searches of arrestees at the place of arrest, searches at the stationhouse prior to booking or placement in a holding cell, or searches pursuant to an evidentiary criminal investigation do not control our review, because housing in the general jail population and the issues attendant to effective detention facility administration are not factors in those cases.

Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 971 (9th Cir. 2010) (en banc) (internal citations omitted). This reasoning is consistent with the lineage of *Turner*. In other words, *Turner* informs and clarifies the proper dimensions of the relative rights under the *Bell* analysis, and application of *Turner*'s analysis to this case clearly demonstrates that the procedures at issue here are constitutional.

2. *Turner* and *Bell* Are Not Inconsistent.

Mr. Florence's dismissiveness of *Turner* may be attributable in part to the fact that the Court of Appeals for the Third Circuit saw no need to consider *Turner*. The same reluctance was manifested by the en banc Court of Appeals for the Eleventh Circuit in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008). Indeed, although both the en banc Courts of Appeals for the Ninth and Eleventh Circuits have upheld practices similar to those at issue here, they disagreed as to what effect *Turner* had upon the *Bell*

analysis. In contrast to the Ninth Circuit's analysis in *Bull*, the Court of Appeals for the Eleventh Circuit held that *Turner* did not overrule *Bell*, but noted that a defendant that met *Bell*'s standard would satisfy what it perceived as the more defendant-friendly *Turner* standard as well. *Powell*, 541 F.3d at 1302-03.

It is surprising that courts would be wary of *Turner*, given the way this Court's precedents developed and the fact that *Turner* expressly applied the principles set forth in *Bell*. The choice of phrasing of the Court of Appeals for the Eleventh Circuit was odd as well; given that *Turner* relied on *Bell*, it is hard to see how one could wonder whether *Turner* "overruled" *Bell*.

Perhaps the Court of Appeals for the Eleventh Circuit – like Mr. Florence – perceived *Lanza*, *Bell*, and *Hudson* as implicating an "ordinary" Fourth Amendment analysis that is somehow inconsistent with the deferential level of scrutiny *Turner* requires. But the fact is that *Bell* and *Turner* are not inconsistent. *Turner* deference is an application of the Court's emphasis on the proper role of institutional needs and its concomitant recognition that rights that are restricted cannot state a violation of a constitutional right in the jail or prison context except to the extent the violation of that claimed constitutional right undermines the "right to petition the government for the redress of grievances;" the protections "against invidious racial discrimination;" or "the protections of due process." 482 U.S. at 84.

In *Turner*, the Court began with the articulation of those three constitutional rights. The Court went on, "*Because prisoners retain these rights*, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge

their duty to protect constitutional rights.'" *Id.* (emphasis supplied) (citation omitted). The Court's holding in *Turner* was consistent with the results reached earlier in *Bell*, *Block*, and *Hudson*. And, in fact, in each of the pertinent pre-*Turner* cases, the Court included due process analyses and either reserved or rejected the applicability of the Fourth Amendment as the controlling constitutional principle. In *Bell*, for example, the Court merely "assum[ed] for present purposes" that "some Fourth Amendment rights" are retained upon commitment to a correctional facility. 441 U.S. at 558; *and see* quote and discussion *supra* at 14 & n.12. Likewise, as quoted and discussed *supra* at 18-19, the Court – notwithstanding its caution to hold that "the Fourth Amendment is inapplicable in a given context" – did just that in *Hudson*, holding that there could be no legitimate expectation of privacy in a prison cell, and that "the Fourth Amendment proscription against unreasonable searches" does not apply within those confines, because whatever expectation of privacy a prisoner has must "always yield to what must be considered the paramount interest in institutional security." 468 U.S. at 525-28; *see also Lanza*, 370 U.S. at 141, 143 (inquiring about "those principles of the Fourth Amendment which have found recognition in the Due Process Clause of the Fourteenth" and finding the concept of a constitutionally protected area within a jail "at best a novel argument").

None of these cases can be read to hold that the Fourth Amendment's protection against searches is a "retained constitutional right" once a person has been transferred to the custody of a prison or jail. Yet that

is precisely what Mr. Florence argues, positing that under *Johnson v. California*, 543 U.S. 499, 510 (2005) – a case involving an equal protection challenge – *Turner* should be considered inapplicable to Fourth Amendment rights because those rights, like the rights at issue in *Johnson*, are "consistent with proper incarceration." [Florence Br. at 19]. But a careful reading of *Johnson* leads to the *opposite* conclusion, because in *Johnson* the Court also recognized that some rights and privileges are limited or withdrawn upon lawful incarceration. 543 U.S. at 510. Precisely the same principle of limited or withdrawn rights was articulated – and the same case, *Price v. Johnston*, 334 U.S. 266, 285 (1948) was relied upon for support – in describing as limited (or nonexistent) Fourth Amendment rights at issue in both *Bell*, 441 U.S. at 545-46, and *Hudson*, 468 U.S. at 524; *see also Samson*, 547 U.S. at 848. *Johnson* thus affirms that holding.

Now, to be sure, there are contexts in which this Court has rebuffed efforts by courts to modify the way Fourth Amendment rights are analyzed. In *Albright v. Oliver*, 510 U.S. 266 (1994), for example, a defendant had claimed a substantive due process right to be free from "prosecution except upon probable cause." *Id.* at 268. The Court declined the invitation to apply the Fourteenth Amendment and applied the Fourth Amendment instead. *Id.* at 271. There are two possible ways to harmonize *Albright* and *Harper*, although at the end of the day the difference between the approaches may be more rhetorical than doctrinal.

First, courts have – albeit more frequently in the context of excessive force – found that the Fourth Amendment is a proper measure for deprivations of

liberty but not conditions of detention. *See Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (1997).[18] Under this reading, when the Court reserved the Fourth Amendment question in *Bell*, it was resolved by (and practices

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[18] As with the *Bell* line of cases, this Court left open the possibility that the Fourth Amendment protections against excessive force cease at some point in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (not resolving whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins). As the Court of Appeals for the Sixth Circuit recently observed in *Aldini v. Johnson*, 609 F.3d 858, 865 n.6 (6th Cir. 2010), the Courts of Appeals are split as to where to draw that line, with the Second, Eighth, Ninth and Tenth Circuits holding that, if the arrest is warrantless, the line is crossed when arraignment occurs or when the arrestee leaves the custody of the arresting officer(s). The Fifth Circuit construes the line as blurred, *id.*, while the Fourth, Seventh, and Eleventh Circuits hold that once a person has been arrested, the Fourth Amendment is no longer relevant and the question is, instead, one of substantive due process. *Id.*

The question of what precisely triggers the transition has been addressed relatively infrequently and inconclusively in strip search cases, but there are courts that recognize a point of transition. At least some courts view strip searches differently depending on whether the person being searched is going to be admitted to jail. *See, e.g., Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 958 (6th Cir. 1987); *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008) (upholding searches of arrestees intermingled with general population of a corrections facility, but not those awaiting bail, and stating that when an arrestee is kept alone in a holding cell, the "obvious security concerns inherent in a situation where the detainee will be placed in the general prison population are simply not apparent"); *but see Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984) (intermingling is only one (and not the determinative) factor in assessing the reasonableness of a strip search).

such as those at issue here would clearly be governed by) *Turner*.

Second, *Turner* could be read merely to define the proper "weight" to be placed on each side of *Bell*'s balancing test when a person is incarcerated. As the Court of Appeals for the Seventh Circuit explained in *Peckham v. Wisconsin Dep't of Corr.*, 141 F.3d 694 (7th Cir. 1998), under *Bell* and its progeny there are some retained Fourth Amendment rights, but, "given the considerable deference prison officials enjoy to run their institutions, it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." *Id.* at 697.

Under either construction, the privacy right of an inmate – whether it is non-existent or de minimis – does not trump the institutional interests that animated the decision that observing new detainees as they prepare to "kwell" and shower would be a single minimally intrusive step that would help to prevent the spread of lice and communicable diseases, to identify gang affiliation, and to detect contraband.

B. Mr. Florence Has Not Overcome the Deference Due to the Burlington County Detention Center.

Burlington County proffered several health and safety institutional interests that led to its decision that everyone admitted to the jail should be subject to the minimally intrusive intake procedures. In addition to the self-evident protection against lice, Burlington County discussed the threats it faced from contagious diseases such as MRSA and from gang infiltration, as well as from contraband – the institutional interest that had been articulated in

Bell [Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 at 8-10 & Ex. A, C; Joint 3d Cir. Br. (Burlington) at 15-17; Joint 3d Cir. App. at 133-166, 175-227]. And the standard form itself stated that "visual observation was made for recent injuries" [*e.g.*, J.A. 390a], permitting corrections officers to identify circumstances when there was a need for medical treatment, or, for that matter, circumstances that might signal a suicide risk or need for other mental health intervention and/or treatment.[19]

The district court weighed Burlington County's institutional interests, and they are thus before the Court here. Yet rather than proffer any evidence that Burlington County did not face the problems that it does, Mr. Florence merely insisted below – and insists here – that the only justification the courts should weigh is the interception of contraband. He then went on to argue that there was insufficient linkage of contraband and misdemeanants to warrant a strip search [*Compare* Florence Summary Judgment Br. Dist. Ct. Dkt. 137 at 4-5, *with* Florence 3d Cir. Br. at 19-24 *and with* Florence Br. at 17-18; 28-35]. While recognizing that Burlington County had proffered other reasons, the Court of Appeals found that even the interception of contraband alone was enough to justify the practice at issue [Pet. App. 28a n.9].

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[19] A recent study showed that of the suicides taking place in jails, 84 percent took place in county jails, and almost a quarter of jail suicides occurred during the first 24 hours after intake. While 77 percent of jails provided some form of intake screening, only 8 percent of the victims were on suicide watch at the time of death. Nat'l Ctr. on Insts. & Alts., National Study of Inmate Suicide (May 29, 2010), *available at* http://www.corrections.com/news/article/24586.

Mr. Florence (and some of his amici) denigrate the institutional interests that were articulated by Burlington County, suggesting that they are somehow fictitious – or at least overstated. He is not the first to employ such a tactic given an inability to demonstrate any impropriety in the balance between the minimal privacy interest and weighty institutional concerns. *See, e.g., Banks v. United States*, 490 F.3d 1178, 1189 (10th Cir. 2007) (upholding the federal DNA Analysis Backlog Elimination Act against a Fourth Amendment challenge and observing that plaintiffs attempted to "overcome the minimal weight on their side of the scale by criticizing the link between the Government's stated interests and the Plaintiffs' status as non-violent felons"). Mr. Florence's doubts did not meet his burden to place "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations," and the Court of Appeals was right to defer to the jail administrators' "expert judgment in such matters." *Block*, 468 U.S. at 584-85. The institutional challenges facing Burlington County Jail – and jails all over this country – are very real, and they have been documented in case law, publicly available literature, and elsewhere.[20]

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[20] Moreover, it is disingenuous for Mr. Florence to complain – on this interlocutory appeal – about any lack of direct evidence in the record. When Burlington County explained to the district court that it had boxes of records it had collected on inmates documenting, inter alia, gang membership and contraband, the district court brushed the point aside, saying that the constitutionality of Burlington County's practice was a question of law, and not of fact [J.A. 354a-357a]. Given this exchange, and given the fact that *Bell* had already affirmed the penological importance of protecting against contraband, Burlington County attached exhibits on summary judgment that focused on the

In a case that began not dissimilarly to Mr. Florence's, an officer in Urbana, Illinois stopped a car after its driver disobeyed a traffic sign. The officer ran both the driver and the passenger through the computer and found that the passenger had an outstanding warrant for his arrest. At the Champaign County Correctional Center, the officers strip searched the defendant and found a bag containing 15 rocks of cocaine. *People v. Johnson*, 778 N.E.2d 772 (Ill. App. Ct. 2002), *appeal denied*, 788 N.E.2d 732 (Ill. 2003). In affirming the constitutionality of the statute that permitted such searches, the court did not mince words:

> Jails and correctional officials have a legitimate and substantial need, along with a corresponding duty, to prevent arrestees from smuggling weapons or contraband into a detention facility. The practice of strip searching detainees before their intermingling with the general jail population is a necessity for the health and safety of the arrestee, other inmates, and the correctional officers.

Id. at 779. *See Bull*, 595 F.3d at 969 ("Jail officials found contraband on arrestees charged with a range of offenses, including non-violent offenses such as public drunkenness, public nuisance, and violation of a court order"); *Powell*, 541 F.3d at 1310-11 (discussing cases).

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less-developed health and gang identification issues [Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 (Ex. A, C)]. Similarly, Essex County attached exhibits documenting gangs and contraband in its facility [Essex Summary Judgment Br., Dist. Ct. Dkt. 131 (Ex. K)].

Burlington County Detention Center's administration is responsible for the health and safety of all inmates and all staff – which of course includes the new detainee. That new detainee will be housed with persons accused of all manner of crimes, and there is no assurance as to any incoming detainee's health or hygiene. Contrary to the contentions of the former Attorneys General, New Jersey's Administrative Code has in other contexts spelled out in detail almost identical procedures to meet an analogous articulated purpose. *See* N.J. Admin. Code 13:92-5.3(a)(9), (10), (11) (explaining signs, including lice and bruises, that are to be identified by officials when a juvenile is admitted to a facility).[21]

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[21] With all due respect, the former Attorneys General have been remarkably selective in their portrayal of state law, both in this regard and in their failure to discuss then – N.J. Admin. Code 10A:31-1.3 (2005) and 10A:31-8.5(b)(1)-(7) (2005). The first of these (10:31-1.3) is discussed *supra* at n.9. The other allowed a strip search of anyone – regardless of the level of offense – upon commitment to an Adult County Correctional Facility, as well as, inter alia, of anyone with a prior conviction of a crime. It coexisted with a different Code provision limiting strip searches on persons arrested for a non-indictable offense. The provision permitting strip searches on admission has since been amended to reach only persons arrested for a crime. But, of course, the conduct in question would be measured by the law then in effect. And at that time, officials presumably were aware not only of these Code provisions but that the statutory limitations on strip searches were meant to "provide greater protection than is afforded by the Fourth Amendment." *State v. Hayes*, 743 A.2d 378, 384 (N.J. Super. Ct. App. Div. 2000) (determining that, under the statute, the police could not strip search a defendant being held while they ran a search to determine if there were additional outstanding warrants because the defendant was not then "lawfully confined.") Officials presumably were likewise aware that the limitations were motivated by a concern that persons arrested but not to be admitted to jail not be strip searched. *See id.*; *see also State v.*

Even more intrusive screenings have been upheld as justified by such institutional needs. In *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), for example, a case cited by Mr. Florence, two strip searches were upheld, one based on individualized suspicion and the other based on institutional health concerns. When it decided *Powell*, the Court of Appeals for the Eleventh Circuit superseded its holding as to the first search. *See* 541 F.3d at 1301. In upholding the other search – which was not at issue in *Powell* – the Court of Appeals observed that "[t]he Alabama legislature has mandated that sheriffs 'exercise every precaution to prevent the spread of disease among the inmates.'" *Skurstenis*, 236 F.3d at 683, *citing* Ala. Code § 14-6-95. Pursuant to this mandate, the Shelby County jail instituted a policy of searching all inmates who have been admitted to the general jail population for communicable diseases at the earliest possible time during their incarceration. Because of the prevalence of head and body lice among inmates and because of the difficulty in sanitizing an area after lice have been found, one of the prime objectives of the search was to determine if an inmate had such lice. *Skurstenis*, 236 F.3d at 683. Based on that justification, the court upheld a cross-sex examination for lice, performed by a nursing assistant, in which the assistant "ran his fingers through" her head and pubic hair, *id.* at 681, reasoning that the intrusion was minimal, and, because of the threat of the

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Sheppard, 483 A.2d 235, 238-39 (N.J. Super. Ct. Law Div. 1984) ("While law enforcement officers have a legitimate interest in uncovering weapons or contraband, that interest is not without boundaries. The mere fact that a person is validly arrested, as here, does not provide the arresting officer an invitation to a limitless search absent some justification beyond the mere inability to post bail.")

transmission of body lice among inmates, the search was justified. *Id.* at 683. Surely that process is more humiliating than a same sex officer observing an inmate – from a distance – and then ensuring that he applies delousing shampoo properly, leaves it on for ten minutes, and showers it off.

In any event, "fine-tuning" to make the policy less observant would not eliminate criticism. Indeed, when the Court of Appeals for the Seventh Circuit upheld a policy that struck a different balance and implemented a more limited delousing policy, the lack of supervision and intervention caused the court to be skeptical. *See Russell v. Richards*, 384 F.3d 444 (7th Cir. 2004) (applying the Fourteenth Amendment to consider whether delousing violated a right to be free from unwanted medical treatment).

> There are some shortcomings in the jail's efforts to avoid such infestations by administering the delousing shampoo to new inmates, which may help to explain why the jail, by its own admission, finds itself disinfecting one or more cell blocks every six months or so. First, inmates are not told that they should leave the delousing shampoo in their hair for ten minutes, as the instructions accompanying Liceall shampoo advise. Second, as we have noted, no effort is made to ensure that an inmate uses the shampoo at all. Third, inmates are not asked to follow-up the initial application of Liceall with a second application seven to 10 days after the first, as the instructions recommend. Fourth, lice can infect not just the scalp but other areas of the body, but no prophylactic efforts are taken to address anything but head lice.

Id. at 446.

Lice are not the only health hazard that the Detention Center explained to the district court and the Court of Appeals [*See* Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 at 9; Joint 3d Cir. Br. (Burlington Argument) at 16]. Communicable diseases such as MRSA can be easily spread and are costly to treat. The New Jersey Department of Corrections has posted on its website two videos entitled: MRSA: What You Need To Know and MRSA: Preventing Outbreaks in NJ Prisons. *See* http://www.state.nj.us/corrections/pages/index.shtml. That website also provides links to further information documenting the seriousness of the threat MRSA poses to inmates and staff. Indeed, in an argument plainly designed to promote its own profession, amicus Medical Society of New Jersey acknowledges and affirms the seriousness of the health threat jails face but suggests that they are effectively met only if medical (or at least medically trained) personnel conduct more intensive examinations. Suffice it to say that a better audience for that sort of policy argument might be the Board of Chosen Freeholders, or perhaps the state legislature.

Nor were health risks the only dangers Burlington County raised below. The County is also trying to protect its personnel and inmates from gangs. Recently, Burlington County was identified as one of only seven counties in New Jersey with over 100 active gangs. *See* N.J. Dep't of Law & Pub. Safety, Div. of State Police, Intelligence Section, Gangs in New Jersey: Municipal Law Enforcement Response to the 2010 NJSP Gang Survey, *available at* http://www.senatenj.com/uploads/district9/gangs-in-nj.pdf. The earlier 2007 report noted that gangs were present in 68 percent of Burlington County's municipalities [Joint 3d Cir. App. at 225]. Protection

against violence – and, in particular, gang violence – poses a serious challenge for the jail administration. In fact – as Burlington County discussed in its brief before the Court of Appeals – that court has affirmed the segregation of gang members under *Turner v. Safley*, 482 U.S. 78 (1987), thereby acknowledging the threat they pose to institutional security. *See Fraise v. Terhune*, 283 F.3d 506, 520-21 (3d Cir. 2002).

The State of New Jersey Commission of Investigation described the dominance of gangs in New Jersey's state prisons in a report entitled: Gangland Behind Bars: How and Why Organized Criminal Street Gangs Thrive in New Jersey's Prisons . . . and What Can be Done About it (May 2009), *available at* http://www.state.nj.us/sci/pdf/Gangs%20SCI%20Report%20Full.pdf. That report made several observations that confirm Burlington County's concerns.

- "[Department of Corrections] officials testified that the current identification process may effectively pinpoint as many as 90 percent of gang members entering the system or as few as 15 percent." *Id.* at 36.
- "Perhaps more troubling, the Commission found through a survey of the 21 County Prosecutors' Offices that they are seeing individuals otherwise known to be gang members with diminished and/or less obvious tell-tale tattoos, clothing and other physical markers." *Id.*
- "[F]ew counties currently use those same [gang identification] criteria" as the state prisons do. *Id.* at 37 (which, of course, undermines statewide identification and containment efforts).

Finally, it should be said that Mr. Florence's minimization of the concerns that Burlington County has raised surely should have no place in a judicial system willing to entertain lawsuits by those inmates who have experienced the very harms that the County's policy sought to protect against. *See, e.g., Hall v. Cole*, No. 08-4904 (NLH), 2009 U.S. Dist. LEXIS 6412, at *27-30 (D.N.J. Jan. 28, 2009) (refusing to dismiss Eighth Amendment claims against the warden, certain named correctional officers, and the Burlington County Board of Freeholders where an inmate alleged that he was housed with a person with infectious open sores and that he contracted infectious lesions from him); *Paulino v. Burlington Cnty. Jail*, No. 07-5315 (RBK), 2010 U.S. Dist. LEXIS 132509, at *1-2 (D.N.J. Dec. 14, 2010), *aff'd*, No. 10-4795, 2011 U.S. App. LEXIS 15113 (3d Cir. July 21, 2011) (dismissing on summary judgment lawsuit brought by pretrial detainee assaulted by gang member while awaiting trial).

In sum, Burlington County advanced profound (and sound) institutional rationales in support of its policy. The County believes that a proper response to those concerns is for it to treat all inmates for lice and to conduct a minimal initial observation to screen for obvious signs of contagious disease, gang affiliation, and contraband. It is easy to lose sight of the pragmatic and protective nature of these goals when reading Mr. Florence's provocative brief. He invites visceral reactions – but reactions that are directed toward the entirety of Mr. Florence's experience, not the kwelling process itself.

For that matter, it appears that much of Mr. Florence's brief is directed toward an entirely different complaint: what Mr. Florence and his amici

seem really to want is for some category of offenders (presumably "non-indictables") not to go to jail at all, either because persons who commit such offenses should not be arrested or because they should not be taken to jail even if placed under arrest. One could certainly write such a rule. But it would have nothing to do with the question before this Court: whether observing detainees upon entry to the jail is reasonably related to the protection of those who work at and reside in the jail.

Apparently hoping to appall his readers, Mr. Florence discusses cases (and sometimes not even cases, but simply newspaper articles) from other jurisdictions where what many would view as outrageous arrests occurred – and a strip search (often abusive) – accompanied the arrest. This attempt reaches its apex at pages 25-26 of his brief where he prefaces his argument by saying: "The police thus regularly invoke their settled power to arrest an individual lawfully for any minor offense." He then describes a case in which a child was taken to a juvenile detention center for eating a french fry in a District of Columbia metro station [Florence Br. at 25]. But that child was neither kwelled nor strip searched.[22] And, of course, whatever the Court rules here will have no impact on whether the District of Columbia is allowed to require that juveniles who violate the law be brought to detention centers – or

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[22] Mr. Florence does not explain that the Court of Appeals for the District of Columbia upheld the District's zero tolerance policy despite the fact that adults violating the policy received a citation carrying a $10-$50 fine, while children were taken to a juvenile detention center until their families retrieved them. *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1159 (D.C. Cir. 2004).

whether a zero-tolerance policy on eating in train stations makes sense. Nevertheless, Mr. Florence uses that case as a springboard for describing three newspaper articles (from 1980, 1982, and 1983, respectively) that recount stories of women allegedly arrested and abusively strip searched – two in the District of Columbia and one in Maryland – in support of his proposition that outrageous strip searches "abound" [*id.* at 25-26].[23] It is hard to see how stories of the mistreatment of women in other jurisdictions during the 1980s have any bearing on how and why New Jersey – much less the Burlington County Detention Center – conducts its intake procedure and whether that procedure is constitutional.

III. "INDIVIDUALIZED SUSPICION" IS NOT A COHERENT OR WORKABLE STANDARD IN A DETENTION CONTEXT.

The practice at issue here – like the practices at issue in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (drug testing of student athletes), *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002) (drug testing of students participating in a variety of extracurricular activities), and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 620 (1989) (same for certain railroad employees) – is a generalized procedure that is implemented to prevent harm to all inmates and staff. Nothing in *Bell* sets forth a requirement of individualized suspicion, which may explain why the Court has included *Bell*

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[23] Mr. Florence also discusses two actual strip search cases (both also of women) – one discussed by the dissent in *Bull*, and another the subject of the decision by the Court of Appeals for the Sixth Circuit in *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989).

among cases where individualized suspicion is not required due to an institution's special, non-law enforcement needs. *Vernonia*, 515 U.S. at 663-64 n.3.

In this instance, even more than with drug testing, the reliability and effectiveness of the policy depends upon the consistency and predictability of its application. The Court of Appeals recognized – as now-Chief Judge Kozinski had recognized in *Bull* – that the downside of "individualized suspicion" is that it injects subjectivity into a process that should be generally applied. *See Bull*, 595 F.3d at 983 (Kozinski, J., concurring) (when an institution performs blanket searches, it "trade[s] the protection afforded by individualized suspicion for protection derived from the fact that the government treats all similarly situated people in precisely the same way"). This trade-off is justifiable, because "[t]he potential for abuse in a 'reasonable suspicion' scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest" [Pet. App. 27a]. Moreover, as this Court has observed in the law enforcement context:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but

> they may be "literally impossible of application by the officer in the field."

New York v. Belton, 453 U.S. 454, 458 (1981) (citation omitted).[24]

The regime that Mr. Florence and many of his amici propose is even more unworkable than a restriction placed on police in the field. An offense level is not a reliable indicator of a person's likelihood to have lice or a communicable disease – or, for that matter, gang membership. And while one might expect persons committing certain sorts of offenses to be more likely to try to transport certain sorts of contraband (e.g., a person accused of a non-indictable controlled substance offense might be more likely to attempt to bring in controlled substances than persons accused of other offenses, whether indictable or not), the charge alone does not provide enough information for a jail to formulate "individualized suspicion."

There is likewise no evidence that a charge is a reliable measure of the risk the violator poses. As the district court noted, many offenses in New Jersey could be either indictable or non-indictable offenses, depending upon the penalty – including the charge on which Mr. Florence's warrant was issued [J.A. 26a]. Moreover, even if one were able to separate, say, non-indictable trespassing from indictable trespassing, one would still be unable to say which of those offenders would be the more likely to be gang members or to have contracted MRSA or lice. An officer admitting a detainee into the jail cannot be deemed to know how hostile or erratic the detainee's behavior

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[24] The Court's conclusion in *Belton* was criticized by the Court in *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

was up to and during arrest and booking; to know whether a thorough search will show outstanding warrants under other names or in other states' or federal databases; or to know the full circumstances giving rise to the arrest. And that officer certainly does not know the person's health or hygiene history or his or her gang affiliation (absent a record of previous detentions at that jail). Indeed, all that an admitting officer can be deemed to know for certain is that the arresting officer and the officer at the police station determined that detention was proper in accordance with the standards set forth in New Jersey Rule of Court 3:3-1(c).

In *Block*, the district court proposed permitting the jail to deny visits to some persons while mandating that the jail permit visits for others. The Court recognized that any such line would be unworkable:

> There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visitation such as that imposed here. It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial. The burdens of identifying candidates for contact visitation – glossed over by the District Court – are made even more difficult by the brevity of detention and the constantly changing nature of the inmate population.

468 U.S. at 587. Although drawing on *Bell* rather than *Block*, the en banc Court of Appeals for the Eleventh Circuit reached the same conclusion in *Powell*:

> The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all "[i]nmates at all Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Bell*, 441 U.S. at 558, 99 S. Ct. at 1884. It was a blanket policy applicable to all.

Powell, 541 F.3d at 1310. And the Court of Appeals for the Ninth Circuit considered at great length how its own precedents would make a rule that allowed strip searches for only certain classes of persons unworkable:

> How is a Deputy Sheriff confronted with a suspect arrested on possible charges of vandalism (like plaintiff Bull), burglary (like plaintiff Timbrook) or interfering with a police officer (like plaintiff Galvin) going to know whether such individuals are subject to search? Finally, we get to the most troublesome category: cases

where the deputies determine there's individualized suspicion for a search. The district court found this includes anyone with a prior involving weapons, controlled substances or violence, thereby importing all the ambiguities discussed above. But even arrestees without relevant priors may be searched if their conduct raises suspicion that they're smuggling contraband. So what exactly does that encompass? While struggling to prove that no member of the protected class has ever been found with contraband in their private spaces . . . plaintiffs classify an arrestee who was "nodding off," and another who was "nervous," as inmates as to whom there was individualized suspicion. If "nodding off" and "nervous" are sufficient for individualized suspicion, can "gave me a dirty look," "was hyperactive" or "had poor posture" be far behind? How, exactly, are deputies to know what does and does not amount to individualized suspicion, and who ultimately decides? Administering this category, like the others discussed above, will require a fair amount of trial and error, and a substantial degree of judicial involvement . . . It's easy enough to say who is and is not going to enter the general population of a jail, just as it's easy to say who is going to engage in a contact visit, board a commercial aircraft, enter a public building, drive a railroad or play high school football. The activity in question defines the class. But once courts start carving out constitutionally favored sub-classes because the members belong to some imaginary group with a lower risk rating than the class as a whole, courts cannot avoid getting intimately involved in the conduct of the activity. This one case has

> generated a substantial record, countless lower court pleadings and no less than seven appellate opinions – so far. And *Yourke*, a case involving just a single strip search, has been ongoing over six years. If plaintiffs here succeed, every strip search will become a potential federal case. Federal judges will start running the jails, along with pretty much everything else.

Bull, 595 F.3d at 985-87 (Kozinski, J., concurring) (internal citations omitted). With all due respect, the institutional costs of making a wrong call as to which persons are the "right" ones to kwell are high, and, given the balancing under *Bell* and *Turner*, whatever de minimis privacy interest a detainee might retain plainly does not warrant subjecting other inmates or jail personnel to illness, violence – or liability – for performing an imperfect calculus about who is "suspicious" and who is not.

CONCLUSION

People go to jail because a judge makes a decision – to issue a warrant, to deny bail, or to sentence. In each instance, the judge has determined that the threat to public safety trumps a person's right to remain "on the street." By definition, gathering all such threats under one roof creates an unsafe place. Yet despite the inherently unsafe nature of a jail, wardens are charged with ensuring the safety of both the inmates and the people working at the jail. One long-accepted element of maintaining safety and security entails watching all inmates at all times, drawing no lines based on what the inmate is doing or why the inmate was admitted. Consistent with that philosophy, in this case and at this time, Burlington County thought it a good policy to observe

and kwell every inmate upon admission to the general population. There is nothing in the Constitution of the United States or any decision of this Court that says that that is an unreasonable policy when placing people into a jail. And the fact is that it is not. Accordingly, Burlington County respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Essex County Correctional Facility's alleged former practice of conducting visual searches of all arrestees, all of whom were housed in the general jail population regardless of the offense for which they were arrested, did not violate the Fourth Amendment.

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INTRODUCTION

Petitioner challenges the Essex County Correctional Facility's (ECCF) policy of "strip-searching" all newly admitted inmates upon their entry to jail—and its supposed "visual body-cavity search" of him—by appealing to anything except this Court's established Fourth Amendment jurisprudence.[1] Petitioner contends that because strip-searches (with or without visual body-cavity searches) involve such a significant invasion of privacy, they cannot be conducted on individuals arrested for non-felony offenses unless there is individualized suspicion that each arrestee is carrying contraband.

Petitioner's challenge finds no support in this Court's decisions. This Court's cases addressing constitutional claims against correctional facilities recognize that those institutions have an overriding security interest in protecting inmates and staff against which privacy interests must yield. Because of their uniquely difficult responsibilities, administrators properly receive tremendous deference on the appropriate means for achieving a correctional facility's

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[1] For purposes of this appeal, respondents ECCF and the Essex County Sheriff's Department (together "Essex") do not dispute that requiring inmates to remove their clothes and take a shower upon admission to jail may be termed a "strip search" if the Fourth Amendment were applicable. Accordingly, throughout its brief, Essex refers to that practice as a "strip search." Essex understands, like this Court, that such "strip searches" are distinct from "visual [body] cavity searches." *See Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979) (discussing strip searches upheld by district court and therefore not at issue). "[V]isual [body] cavity searches" may require inmates to "expose their body cavities for visual inspection," *id.*, or to manipulate their genitals for better detection of contraband, *id.* at 558 n.39.

goals. These fundamental tenets doom petitioner's Fourth Amendment challenge.

First, newly admitted inmates do not have a legitimate expectation of privacy against strip searches or visual body-cavity searches upon entry into jail. Founding era practices and this Court's decisions establish that any expectation of privacy against the non-investigatory searches alleged here is not objectively "legitimate" or "reasonable" in light of a correctional facility's paramount interest in ensuring the health and security of inmates and staff.

Second, if the Fourth Amendment applies, the searches alleged here need only be reasonably related to legitimate penological interests and are, therefore, constitutional. Likewise, under the "special needs" framework that governs searches conducted in correctional facilities to serve institutional (not law enforcement) purposes, the alleged searches are reasonable.

The Court should affirm the judgment.

COUNTERSTATEMENT OF THE CASE

A. Intake Procedures At ECCF

1. ECCF is the largest county jail in New Jersey. J.A. 70a. Located in Newark, ECCF has an average daily population of 1923 inmates and admits approximately 25,175 inmates annually. *Id.* ECCF houses prisoners under sentence, detainees held on behalf of the United States government, detainees from other jurisdictions, state-remanded prisoners, and individuals arrested on a range of charges. *Id.*

ECCF is one of the most dangerous jails in New Jersey. J.A. 338a. Located in a large urban area with a high crime rate, ECCF tends to house more indi-

viduals charged with violent crimes or drug-related offenses than other county jails. *Id.* ECCF houses approximately 1000 gang members daily. *Id.* at 70a.

Like all jails, ECCF faces the constant threat of weapons, drugs, and other contraband, which jeopardize the safety and health of inmates and staff. See J.A. 70a-71a, 380a-82a, 385a; *Hudson* v. *Palmer*, 468 U.S. 517, 527 (1984) ("attempts to introduce drugs and other contraband into [facility] premises ... is one of the most perplexing problems of prisons"). "Jails are designed to be clean and clear of contraband at all times" in order to ensure the safety of inmates and jail staff. J.A. 382a, 385a. What constitutes "contraband"—and could therefore threaten safety, health, or institutional order—is limited only by the ingenuity of inmates. Joint Appendix at 378-79, *Florence* v. *Burlington*, Nos. 09-3603 *et al.* (3d Cir. filed Nov. 25, 2009) (hereafter "CA3 App."). Contraband is not only weapons and drugs, but includes items that can be bartered and seemingly innocuous items, *e.g.*, "pens, paper clips, [and] chewing gum." *Id.* at 377 (testimony from expert designated by petitioner); J.A. 323a; *accord Dodge* v. *Cnty. of Orange*, 282 F. Supp. 2d 41, 47 (S.D.N.Y. 2003) (opposing experts agree that "money, cigarettes, or even excess prison issue items" "can increase the level of violence and endanger the health, safety and well-being of inmates, staff, and civilians in a correctional facility").

At ECCF, contraband is "found on a daily basis." J.A. 70a-71a. It has been found on newly admitted inmates, inmates returning from court, and inmates arriving from other agencies. *Id.*; see *id.* at 350a. This contraband is typically "hidden on the person," including in one's clothing, mouth, shoe, hair, "underwear or in an orifice." *Id.* at 71a.

2. To combat the introduction of contraband, ECCF in practice follows specific intake procedures for all newly admitted detainees. J.A. 277a, 288a, 297a, 299a, 318a. All detainees are brought into a "pre-booking" area with the necessary arrest or confinement documentation. *Id.* at 265a, 294a, 324a. As they enter, inmates pass through a metal detector. *Id.*[2] Once in the pre-booking area, they are asked identifying questions, and personal belongings are bagged and catalogued. *Id.* at 294a. Inmates are then taken down the hall to the Sheriff's Department, where they are fingerprinted and photographed. *Id.* at 267a, 296a, 327a.

Afterward, they return to a waiting room or holding cell in the pre-booking area that can hold dozens of other inmates. J.A. 268a, 297a-98a, 328a. There, inmates are not segregated by the perceived seriousness or potential punishment of their offense. *Id.* at 297a-98a, 15a. As one class-member explained, "I was put in a holding cell with about 30 other arrestees, being a mix of persons with murder charges, gun charges and traffic violations, among other charges." Certification of Ryan Engstrom, ¶ 3 (D.N.J. filed Apr. 25, 2008) (Doc. 99). In the holding cell, guards observe the inmates, who remain in their street clothes, are not restrained, and may mill about and watch television. J.A. 297a-98a, 301a-02a, 327a-28a. Each inmate also is permitted a 10-minute phone call. *Id.* at 328a. Inmates are not patted down or otherwise searched in the waiting room. *Id.* at 301a-02a, 327a-28a. One guard summarized, "you wouldn't really know [if a person is carrying contraband], because

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[2] Since 2006, inmates must also sit in the Body Orifice Scanning System (BOSS) chair. J.A. 58a, 324a. It is, in essence, a more thorough metal detector. *Id.* at 58a, 334a. Neither device detects drugs or other non-metal contraband. *Id.* at 334a.

[the metal detector] wouldn't go off and he still has his [street] clothes on at this point." *Id.* at 298a.

From this waiting area, an inmate is called up to a series of "stations," where officers gather and enter medical and property information into the computer system and give the inmate a cell assignment. J.A. 268a, 299a-300a, 302a.

After completing this process, the inmate is directed to the shower area. J.A. 268a, 288a, 300a, 302a. It is semi-enclosed and set-off from the rest of the intake area. *Id.* at 287a. It contains five shower stalls (of which ECCF uses only three), each separated by a wall but no front curtain or door. *Id.* at 269a-70a, 287a, 325a-26a, 330a-31a. One inmate is escorted to a shower stall by an officer and instructed to remove all clothing and to take a shower. *Id.* at 272a, 284a-85a, 288a, 305a-06a. The inmate is further instructed to place all clothing into a gray bin and to use the cleaning supplies sitting on a stool in the shower stall. *Id.* at 271a, 284a-86a, 305a-07a, 325a; see also CA3 App. 391 (Essex formerly required inmates to use a delousing agent). Also on the stool are a uniform, towel, undergarments, soap, toothpaste, and other sundries. J.A. 286a. While the inmate showers, the officer searches the clothing in the gray bin for contraband, and sends the inmate's belongings to be held for the period of confinement. *Id.* at 286a, 305a-07a, 309a, 311a, 325a. After showering, the inmate dons an orange jumpsuit. *Id.* at 311a-12a. In the shower area, officers must monitor the inmates "to deter any problems that might happen or occur." *Id.* at 317a.

Petitioner's claims against Essex arise from his alleged experience with this intake procedure.

B. Procedural History

1. In 1998, petitioner was arrested and charged with obstruction of justice and use of a deadly weapon after fleeing police officers in an automobile. J.A. 25a-26a, 239a-42a; see also *Sykes* v. *United States*, 131 S. Ct. 2267, 2273 (2011) (holding that vehicle flight is categorically a violent felony because, *inter alia*, it "'presents a serious potential risk of physical injury to another'" and displays a "lack of concern for the safety of property and persons"). He pled guilty to the lesser crime of hindering prosecution and obstructing the administration of law, see J.A. 26a, 243a, and was sentenced to two years probation and a fine, *id.* at 26a, 244a. According to computer records, petitioner was also sentenced to two days in jail. *Id.* at 393a.

At some point, the State's probation office determined that petitioner had not fully paid the fine, and after petitioner failed to appear at an enforcement hearing, the Essex County court issued a bench warrant for his arrest in April 2003. J.A. 26a, 89a-90a. After the warrant issued, New Jersey's "statewide computerized information system," which gives officers access to "criminal history files for arrest, prosecutorial, and custody information," *id.* at 27a n.7, 148a, showed no change to the 2003 warrant, *id.* at 396a; see *id.* at 392a-93a.

During a traffic stop on March 3, 2005, a state trooper arrested petitioner based on the outstanding warrant. J.A. 391a; Pet. App. 3a, 51a. Despite petitioner's protest against the validity of the warrant and insistence that he had paid the fine, the trooper acting pursuant to the warrant took petitioner to the Burlington County Jail (BCJ). Pet. App. 3a, 51a.

As the lower courts recognized, the parties dispute the intake procedures petitioner underwent at BCJ.

Pet. App. 6a, 63a-65a. Petitioner alleges that during the intake process, BCJ officers "subjected [him] to a strip and visual body-cavity search." *Id.* at 3a, 51a-52a. He claims that an officer, who sat arms-length away, directed him to remove all his clothing and then open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. *Id.* The officer then instructed petitioner to shower. *Id.* Petitioner then was admitted to BCJ, where he stayed for six days. *Id.* Curiously, nothing in the record explains either the delay or any actions petitioner's wife or family made to expedite his transfer to ECCF or to effect his release.

On the sixth day, petitioner was transferred to ECCF. Pet. App. 3a, 52a. Petitioner testified that he spent 20-25 minutes in the above-described holding cell before showering at ECCF, Florence Dep. at 127 (D.N.J. filed Aug. 1, 2007) (Doc. 76), during which time he mingled with a dozen other inmates, *id.* at 123, and placed a telephone call, *id.* at 124.

After leaving the holding room for the shower area, petitioner alleges that he was subjected to a strip- and visual body-cavity search. Pet. App. 3a-4a, 52a. Again, the parties dispute the procedures petitioner underwent. *Id.* at 6a, 63a-66a. Petitioner asserts that ECCF conducted strip- and visual body-cavity searches of him pursuant to a written policy, while Essex maintains that he was only observed by officers while showering but not subject to a visual body-cavity search. *Id.* at 66a-67a. According to petitioner, ECCF officers instructed him and four other arrestees to enter separate shower stalls. *Id.* at 3a-4a, 52a. They were ordered to remove all their clothing and shower in front of two corrections officers. *Id.* Petitioner alleges that after his shower, officers conducted a visual body-cavity search by instructing him

to open his mouth, lift his genitals, turn around (so that he faced away from the officers), and squat and cough. *Id.* Petitioner then donned an orange uniform, visited the nurse, and joined the general jail population. *Id.* The next day the charges against him were dismissed, and he was released. *Id.* His total stay at ECCF was substantially less than 24 hours.

2. Petitioner sued BCJ and related individuals and entities, as well as Essex, under 42 U.S.C. § 1983, claiming that the intake procedures he underwent violated the Fourth Amendment. His governing complaint pleads a single "count" relevant here, which is styled "Unlawful Strip Body Search" and does not distinguish between strip- and visual body-cavity searches. CA3 App. 121; *id.* at 122 (¶ 48). He then sought certification for a class of arrestees "'charged with non-indictable offenses processed at [BCJ and ECCF and] who were directed by ... officers to strip naked before those officers ... without [the officers] first articulating a reasonable basis that those arrestees were concealing contraband, drugs or weapons.'" J.A. 18a. Petitioner alleged that BCJ and ECCF "'have instituted a written and/or de facto policy, custom, or practice of strip searching all individuals who enter the custody of their Correctional Facilities regardless of the nature of their charged crime'" and that this "'blanket strip search'" without reasonable suspicion violates the Fourth Amendment. *Id.* at 17a. The district court noted that, in addition to the strip-search claims upon which he sought certification, petitioner "alleges he was subject to the functional equivalent of a [visual] body cavity search at each jail" but "does not seek class certification on any claim relating to these allegations." *Id.* at 23a n.5. The district court certified petitioner's class of strip-searched arrestees. *Id.* at 43a.

Petitioner then sought summary judgment on "the issue of law regarding whether" BCJ's and ECCF's alleged "policy of strip searching non-indictable arrestees without reasonable suspicion" violated the Fourth Amendment. Pet. App. 49a. Respondents cross-moved for summary judgment, arguing, *inter alia*, that the searches were constitutional. *Id.* at 50a. The court granted petitioner's motion in part (denying only the request for an injunction) and denied respondents'. *Id.* at 50a, 100a.

The district court acknowledged that there were disputed facts concerning the details of BCJ's and ECCF's alleged search policies and the intake procedures petitioner underwent. See Pet. App. 64a-65a. But it concluded that "[w]hatever the case may be," *id.* at 65a, respondents' policies and procedures "'rose to the level of a strip search' under the Fourth Amendment," *id.* at 6a. The court reached this determination for Essex by relying principally on two ECCF policy documents. *Id.* at 57a. The first, "Order No. 89-17," provides that "upon arrival ... all arrestees shall be strip searched and then required to shower." *Id.* It states that "a strip search is to consist of having an arrestee undress completely" while officers "'observe carefully.'" *Id.* Additionally, officers must examine the "arrestee's mouth ... ears, nose, hair and scalp ... fingers, hands, arms, and armpits; and all body openings and the inner thighs." *Id.* The second document, which superseded Order No. 89-17 in April 2005, states that officers must "'[c]onduct a thorough search of individual inmates'" and ensure that "all arrestees shower during intake." *Id.* (alteration in original). There was no dispute that any intake searches at ECCF were conducted to serve institutional interests, and not done for law enforcement

purposes. *Id.* at 85a; *accord id.* at 18a, 140a, 142a (§ B.6-8); J.A. 15a-16a, 50a.

In entering summary judgment against Essex, the court did not distinguish between petitioner's individual claim that the alleged visual body-cavity searches violated the Fourth Amendment and the class's claim that a strip-search alone violated the Fourth Amendment. Pet. App. 64a ("strip search involves squatting, bending one's buttocks, and ... lifting one's genitalia"); *id.* at 66a ("Essex officers carefully observed the ... [inmate's] body openings"); *id.* at 83a-85a.[3] Based on Essex's purported strip- and visual body-cavity search policies, the court granted summary judgment for petitioner and the class. *Id.* at 87a.

The court first determined that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), is the controlling authority. It then held that both BCJ's and ECCF's "search procedures ... do not pass constitutional muster under the *Bell* balancing test." Pet. App. 84a.

The court brushed aside respondents' penological interests justifying those policies. It rejected respondents' showing that the searches uncover gang activi-

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[3] Despite his petition-stage contention that the only theory relevant here is his class-wide strip-search claim, Reply Br. 7 (filed Mar. 9, 2011), petitioner (and his *amici*) repeatedly inject the alleged visual body-cavity searches into their submissions. *E.g.*, Pet'r Br. 6, 18, 30, 32. Indeed, petitioner consistently pressed his visual body-cavity search theory below, despite disavowing it as a class claim. *See, e.g.*, Pl.'s Summ. J. Br. 3, 7-8, 11-13, 17-18 (D.N.J. filed June 28, 2008) (Doc. 116-3); Appellee's Br. 2-3, 24, 28 (3d Cir. filed Jan. 11, 2010); Florence Decl. Supp. Class Certification, ¶ 3 (D.N.J. filed Aug. 1, 2007) (Doc. 73) ("Defendants had a custom and policy of strip and body-cavity searching every arrestee"). In any event, both of petitioner's theories fail.

ty and potential health problems because, in its view, such searches are not the least intrusive means for achieving these goals. Pet. App. 85a-86a.

It was equally dismissive of respondents' demonstration that the policies were justified by significant security interests in deterring contraband. Pet. App. 85a-86a. The court noted (at 85a) that Essex submitted an expert report by George M. Camp, whose studies this Court credited in *Turner* v. *Safley*, 482 U.S. 78, 92-93 (1987). Dr. Camp opined that conducting strip searches—including the type of visual body-cavity searches at issue in *Wolfish*, see J.A. 381a-82a, 386a—for all new arrivals is "an essential function in protecting the security and institutional integrity of jail," *id.* at 385a. In fact, non-indictable detainees "can be more dangerous and ... more likely to bring in contraband." *Id.* at 380a. He also explained that "interaction and mingling between misdemeanants and felons" make it imperative that all inmates are searched, *id.* at 381a, and that if arrestees know that certain categories of offenders will not be searched, "[t]hese weak links [will be] discovered by the inmate population and exploited to the detriment of both prisoners and staff," *id.* at 382a. Despite this and other evidence—including concessions by the lone expert designated by petitioner, whom petitioner attempted to withdraw once he discovered that the expert's opinions supported respondents' policies—the district court faulted respondents for not submitting "supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities." Pet. App. 87a. It did so despite acknowledging that *Wolfish* stated "that evidence of a smuggling problem is 'of little import' to the analysis." *Id.*

The district court nonetheless certified the following question for interlocutory appeal: whether "'a

blanket policy of strip searching all'" non-indictable arrestees "'upon admission to a county correctional facility'" violates the Fourth Amendment. Pet. App. 40a; see also *id.* at 40a n.4, 7a.

3. The Third Circuit accepted the certified question and reversed. Following *Wolfish*, the court assumed *arguendo* that "detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility." Pet. App. 19a. It then determined that *Wolfish*, not *Turner*, provided the standard of review. See Pet. App. 17a-18a & n.5. Applying *Wolfish*, the court concluded that, even as described by petitioner, "the scope, manner, and place of the searches are similar to or less intrusive than those in" *Wolfish*. *Id.* at 20a.

Turning to the other elements of the *Wolfish* test, the court of appeals concluded that "the Jails' security interests at the time of intake before arrestees enter the general population" outweigh "the privacy interests of the inmates." Pet. App. 28a. Recognizing that the facilities have an undeniable interest in limiting contraband and that *Wolfish* "explicitly rejected any distinction in security risk" between detainees and convicted inmates, *id.* at 21a-22a, the court rejected the argument that "jails have little interest in strip searching arrestees charged with non-indictable offenses," *id.* at 21a; see *id.* at 23a-24a ("'low security risk detainees'" would "take advantage of any gap in security") (citing *Block* v. *Rutherford*, 468 U.S. 576, 587 (1984)). The Third Circuit concluded that *Wolfish*, in which this Court upheld a policy requiring visual body-cavity searches for all detainees without regard to individual circumstances, was simply irreconcilable with petitioner's argument that "individualized suspicion" was required "for each inmate searched." *Id.* at 22a-23a & n.8. Finally, de-

spite declining to apply the *Turner* test, the Third Circuit relied on related principles, citing this Court's "repeated[ ] ... emphasi[s] that courts must defer to the policy judgments of prison administrators." *Id.* at 26a (collecting cases); see *id.* at 27a-28a.

SUMMARY OF ARGUMENT

The Court can affirm the Third Circuit's judgment that Essex's intake searches are constitutional on several distinct grounds.

I. The Fourth Amendment does not apply to the intake searches of newly admitted inmates to correctional facilities. The Fourth Amendment only applies to expectations of privacy that are objectively "legitimate" or "reasonable" in light of the security interests of correctional facilities. The founding era practices demonstrate that inmates did not possess an expectation of privacy against strip searches, or even visual body-cavity searches, when entering correctional facilities.

Additionally, this Court's modern Fourth Amendment jurisprudence confirms that newly admitted inmates do not have a legitimate expectation of privacy against the intake searches alleged here. A"right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the close and continual surveillance of inmates ... required to ensure institutional security and internal order." *Hudson*, 468 U.S. at 527-28 (emphasis added).

Inmates may be able to challenge conditions of confinement, including abusive or needless searches, under the Due Process Clause or state law. But the loss of privacy as an incident of confinement eliminates the legitimate expectation required to invoke the Fourth Amendment.

II. Even if the Fourth Amendment applied, the searches here are constitutional under the rational-basis standard of review adopted in *Turner*, 482 U.S. at 89-91. *Turner* governs here because the privacy right asserted here is incompatible with proper incarceration. Under that standard, the intake searches are constitutional because they are reasonably related to Essex's legitimate penological goals. Evidence (and common sense), including unrebutted expert opinion, establishes that the intake searches alleged here have a rational connection to Essex's legitimate interest in preventing the introduction of contraband, which can endanger the health and security of inmates and staff and disrupt institutional order. Moreover, any accommodation of the right petitioner asserts would have a harmful effect on ECCF.

Essex's intake searches also are constitutional under *Wolfish*'s "special needs" framework. Where searches serve "specials needs" of institutions—not law enforcement purposes—the Court determines the searches' constitutionality by "balancing ... the need for the particular search against the invasion of personal rights." *Wolfish*, 441 U.S. at 559; see generally *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619-20 (1989) (listing *Wolfish* among "special needs" cases). The Fourth Amendment's usual requirements of a warrant, probable cause, or individualized suspicion do not apply.

As in *Wolfish*, the searches here implicate correctional facilities' most critical "special needs." In *Wolfish*, because of the profound institutional interest in preventing contraband, this Court upheld strip- and visual body-cavity searches of all detainees at a jail after contact visits. Because the factors identified in *Wolfish* weigh as much or more in Essex's favor as

they did for the jail in *Wolfish*, the alleged searches are constitutional.

Petitioner's attempts to distinguish his challenge from that in *Wolfish* are unavailing. Petitioner mistakenly relies on "common sense" to try to challenge the evidence left unrebutted below. But *Wolfish*'s recognition that searches indistinguishable from those alleged here are useful, other jurisdictions' experiences with similar search policies, and expert opinions presented here establish that strip- and visual body-cavity searching all newly admitted inmates is the most effective way to limit contraband. The evidence also demonstrates that non-indictable arrestees are just as likely to introduce contraband as major offenders. This is consistent with this Court's rejection of attempts to distinguish the risks inmates pose based on the reason for their detention. See *Block*, 468 U.S. at 587; *Wolfish*, 441 U.S. at 546 n.28.

III. Finally, the Court can affirm the judgment for Essex on the independent ground that the intake searches of petitioner, an inmate transferred to Essex from another jail, satisfy both *Turner* and *Wolfish*. Whatever may be said about intake searches of arrestees, such searches of transferees are constitutional because of the unique danger these individuals pose to correctional facilities.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT APPLY TO INTAKE SEARCHES OF NEWLY ADMITTED INMATES CONDUCTED FOR INSTITUTIONAL PURPOSES.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and sei-

zures." U.S. Const. amend. IV. But the Amendment only applies to an "expectation of privacy ... that 'society is prepared to recognize as "reasonable."'" *Hudson*, 468 U.S. at 525. That is, "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984)); see also, *e.g.*, *California* v. *Greenwood*, 486 U.S. 35, 39-40 (1988); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 338 (1985). Whether an expectation of privacy is "justifiable" or "legitimate" is an objective inquiry. The Court has "refus[ed] to adopt a test of 'subjective expectation.'" *Hudson*, 468 U.S. at 525 n.7.

A. Newly Admitted Inmates Have No Legitimate Expectation Of Privacy Against Intake Searches That Serve Institutional Interests.

Founding era practices and this Court's application of the Fourth Amendment prove that newly admitted inmates to correctional facilities do not have a legitimate expectation of privacy against intake searches.

1. This Court has recognized that the origin and history of the Fourth Amendment are relevant to its applicability in a particular case, including whether there was "clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995); see also, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 168 (2008) (looking to "common law ... norms that the Fourth Amendment was meant to preserve").

Here, petitioner cannot claim a legitimate expectation of privacy under the Fourth Amendment because before and after the Amendment was adopted, it was

well-established that inmates entering prisons or jails enjoyed no claim of privacy against intake searches. During the founding era, "[o]nce the suspect was in custody ... practice broadened the ambit of permissible search and seizure." 3 William J. Cuddihy, *Fourth Amendment: Origins and Original Meaning* 1516 (1990) (unpublished Ph.D. dissertation). Indeed, it was "a head-to-foot 'strip search' [that] uncovered General Benedict Arnold's treason" in 1780. *Id.* at 1517. This was consistent with historical practice because "[s]earches of persons in the colonies were at least as far-reaching as those in the mother country"—that is, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." 2 Cuddihy, *supra* at 847-48; see also *id.* at 849 (addressing imprisonment of Quakers who were "'stript naked'" and searched); *id.* at 850-51 (discussing "strip searches" of witches).

These practices persisted before and after the Fourth Amendment was adopted. See Scott Christianson, *With Liberty For Some: 500 Years of Imprisonment in America* 97 (1998) (discussing colonial prison where "as soon as a new inmate was admitted, he or she was bathed, provisioned, interrogated, and told the rules"); *id.* at 114 (addressing prison in 1820 where an arriving inmate "was stripped naked by other convicts ... under the watchful eyes of a keeper. Then he was subjected to a thorough cleansing process known as the 'ceremony of ablution.'"). Even those who advocate that newly admitted inmates now should be accorded broad Fourth Amendment protections admit: "the history of strip search in America remained clear and consistent before and after the Fourth Amendment; *entry to American jails in the*

last five hundred years cost the arrestee any semblance of privacy." Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case For Reasonable Suspicion*, 81 B.U. L. Rev. 239, 248 (2001) (emphasis added).

These historical practices demonstrate that petitioner had no legitimate expectation of privacy against the alleged searches.

2. Even if historical practices do not "'clear[ly] answer'" whether the Fourth Amendment applies here, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 345 (2001), this Court's modern cases foreclose any claim that inmates have a reasonable expectation of privacy against intake searches conducted to serve institutional, not law enforcement, purposes.

Whether "an expectation of privacy is 'legitimate' or 'reasonable'" for inmates "necessarily entails a balancing" of "the interest of society in the security of its penal institutions and the interest of the prisoner in privacy." *Hudson*, 468 U.S. at 527; see *id.* at 524 ("imprisonment carries with it the conscription or loss of many significant rights"). This follows from the fact that "[w]hat expectations are legitimate varies, ... with context." *Vernonia*, 515 U.S. at 654 (citation omitted). Those for whom the state has custodial responsibility necessarily have fewer reasonable expectations of privacy against searches. See, *e.g.*, *id.*; *Samson* v. *California*, 547 U.S. 843, 851-52 (2006); *Bd. of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 831 (2002); *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987).

The first side of that balance—the correctional facilities' security interest—is paramount. "A detention facility is a unique place fraught with serious security dangers." *Wolfish*, 441 U.S. at 559; see, *e.g.*, *id.* at

557; *Overton* v. *Bazzetta*, 539 U.S. 126, 129-30, 134 (2003) (violence and drugs); *Block*, 468 U.S. at 586-87 (low-level detainees implicate risks caused by contraband). Thus, the Court has recognized that the interest in "institutional security ... is central to all other corrections goals." *Hudson*, 468 U.S. at 527 (internal quotation marks omitted).

Against this paramount security interest and other institutional interests in limiting contraband, an individual's expectation of privacy in jail is more limited than in any other context. "[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza* v. *New York*, 370 U.S. 139, 143 (1962). Thus, the Court thought it "at best a novel argument" to claim that "a public jail ... is a place where [a man] can claim constitutional immunity from search ... of *his person*, his papers, or his effects." *Id.* (emphasis added). And *Wolfish* recognized that any privacy expectation that *may* exist in jail "necessarily would be of a diminished scope." 441 U.S. at 557.

More significantly, in *Hudson*, which as here involved non-investigatory searches, the Court "h[e]ld that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell." 468 U.S. at 526; see *id.* at 524-26. The Court explained, in categorical terms, that "[a] right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id.* at 527-28 (emphasis added). Rather, "it is accepted by our society that '[l]oss of freedom of choice and *privacy are inherent inci-*

dents of confinement." *Id.* at 528 (quoting *Wolfish*, 441 U.S. at 537) (emphasis added).[4]

In *Samson*, the Court recognized that *Hudson* held "prisoners have no reasonable expectation of privacy." 547 U.S. at 848; see *id.* at 850 n.2. The dissent agreed that "*Hudson* v. *Palmer* does stand for the proposition that '[a] right of privacy in traditional Fourth Amendment terms' is denied individuals who are incarcerated," finding this "is 'necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, ... chief among which is internal security." *Id.* at 862 (alteration in original) (Stevens, J., dissenting); see *id.* at 862-83 (recognizing additional "'institutional needs'").

Petitioner presents no argument why *Hudson*'s holding—echoed by *Samson*—that prisoners lack a legitimate expectation of privacy from non-investigatory searches does not apply equally to the intake searches here. See Pet'r Br. 18-21. Nor could he. *Hudson* stressed that "society would insist that the prisoner's expectation of privacy *always yield* to what must be considered the paramount interest in institutional security." 468 U.S. at 528 (emphasis added).

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[4] Confinement is the most significant aspect of the privacy analysis here. *Cf.* Pet'r Br. 19-20 (mistakenly comparing intake searches to "government's broad authority to impose punishment"). This Court made clear in *Wolfish* that there is no basis for distinguishing between convicts, pretrial detainees (like petitioner), those held for contempt, or even individuals in protective custody. *See* 441 U.S. at 524, 533-36; *see also Block*, 468 U.S. at 587; *Arruda* v. *Fair*, 710 F.2d 886, 887-88 (1st Cir. 1983) (Breyer, J.) (there is no distinction between "dangerous prisoners" and "persons who had not yet even been convicted of a crime").

Hudson's holdings dispose of petitioner's repeated suggestions (at 9, 31-32) that the mere fact that officers observe an inmate naked violates the Fourth Amendment. See *Johnson* v. *Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (Easterbrook, J.) (no legitimate expectation of privacy precludes guards from monitoring inmates in their cells, the shower, and the toilet because the "monitoring of naked prisoners is not only permissible ... but also sometimes mandatory"); *id.* at 154 (Posner, C.J., concurring in part and dissenting in part) ("the right of ... jails to maintain visual surveillance of ... prisoners even when naked cannot be doubted in light of the serious security problems in ... jails today"). Given "frequent inmate-on-inmate assaults, some of which are of a sexual nature.... round-the-clock visual surveillance of the inmates is crucial and must cover inmates in all areas of the prison, including bathrooms and showers." *Timm* v. *Gunter*, 917 F.2d 1093, 1101-02 (8th Cir. 1990); see *Powell* v. *Barrett*, 541 F.3d 1298, 1313 n.6 (11th Cir. 2008) (en banc).

And, *Hudson* also requires the rejection of any claim that inmates possess a legitimate expectation of privacy against a visual body-cavity inspection upon intake. Granting inmates an expectation of privacy against the type of non-investigatory searches alleged here would be incompatible with the conditions of imprisonment, *Hudson*, 468 U.S. at 527, because it would permit inmates to retain a zone of privacy in which they can secrete small, but dangerous items that threaten institutional order and security.

3. Petitioner acknowledges that a legitimate expectation of privacy is necessary to trigger the Fourth Amendment's protections, Pet'r Br. 18, but just assumes that the test is met here, *id.* at 18-21. That assumption is unfounded for the reasons just explained.

At most, petitioner's assumption that the Fourth Amendment applies rests on his assertion that *Hudson* and *Wolfish* "held that ordinary Fourth Amendment principles govern a claim that jail or prison officials engaged in an unreasonable search of a detainee." *Id.* at 18.

That assertion is demonstrably false.

Neither case holds that the Fourth Amendment applies in this setting, let alone that its "ordinary principles" do. See *infra* § II.B ("special needs" analysis). *Wolfish* assumed *arguendo* that pretrial detainees retained some Fourth Amendment rights. 441 U.S. at 558. *Hudson* went further, holding "that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches *does not apply* in prison cells" where, as here, non-investigatory searches are at issue. 468 U.S. at 530 (emphasis added); *accord Samson*, 547 U.S. at 850 n.2 (*Hudson* "h[eld] [that] traditional Fourth Amendment analysis [was] inapplicable to the question whether a prisoner had a reasonable expectation of privacy").

B. Newly Admitted Inmates May Pursue Other Remedies For Improper Searches.

Petitioner and his *amici* suggest that the Fourth Amendment must govern intake searches at correctional institutions to remedy searches resulting from (allegedly) improper arrests, see Pet'r Br. 18, 30, or unlawfully delayed presentment to a magistrate, *id.* at 5, 19, and to guard against unduly degrading searches unconnected to institutional interests and that may be psychologically harmful to especially sensitive inmates, *id.* at 6, 18, 21-27; see, *e.g.*, Former N.J. Attnys. Gen. Br. 25-30; Sister Galvin et al. Br. 1-15; Psychiatrists Br. 9-11. They are mistaken.

First, the Fourth Amendment is not necessary or proper to protect against searches resulting from an allegedly wrongful arrest or untimely presentment to a magistrate. A plaintiff who prevails on a false arrest claim, for instance, could argue that any damages caused by the strip- or visual body-cavity searches (or detention generally) were proximately caused by the underlying wrongful arrest.

Second, a pretrial detainee may challenge searches inconsistent with "substantive due process." *Overton*, 539 U.S. at 128. If subjected to "'arbitrary and purposeless'" searches for "'the purpose of ... punishment,'" *Block*, 468 U.S. at 584—not institutional interests—inmates may recover under the Due Process Clause, *Wolfish*, 441 U.S. at 535 & n.16; see *Daniels* v. *Williams*, 474 U.S. 327, 330-31 (1986).[5] Here, petitioner alleges that he was searched pursuant to policy, not singled out for an arbitrary or abusive search, and he does not allege that he was searched by female officers or subjected to any especially degrading conduct. Cf. Pet'r Br. 24; Sister Galvin Br. 8-9, 12 (describing searches involving guards of different gender who made lewd comments, as well as taunting during search).

Third, States or localities may "choose[] to protect individual privacy and dignity more than the Fourth Amendment requires," requiring, for instance, individualized suspicion or probable cause to search. *Moore*, 553 U.S. at 174; see *id.* at 180 (Ginsburg, J., concurring in the judgment); see also *Samson*, 547 U.S. at 856 (noting "California's prohibition on 'arbitrary, capricious or harassing' searches"). Although

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[5] Convicts may challenge abusive searches under the Eighth Amendment. *Hudson*, 468 U.S. at 530, 535-36; *Wolfish*, 441 U.S. at 535.

petitioner pleads no state-law claims, he argues that New Jersey and a minority of other States already provide such protections. Pet'r Br. 15-17 & nn.6-7. But see *infra*, 49-50 (petitioner mischaracterizes many such provisions). The availability of state law remedies does not depend on whether the Fourth Amendment applies. See *Moore*, 553 U.S. at 174.

Moreover, if States or localities believe the conditions of confinement associated with incarceration are inappropriate for particular categories of offenders, they can exempt such offenses from arrest. See *id.* at 180 (Ginsburg, J., concurring in the judgment). Legislators may agree, as petitioner's expert testified, that "we shouldn't be bringing certain people into custody." J.A. 344a-45a.

These state-law avenues all are superior to the constitutional rule petitioner seeks. The individualized-suspicion rule petitioner and his *amici* urge wrongly would permit the *federal* constitutionality of a search to hinge on the happenstance of whether a *State* classifies a particular offense as a felony. See Pet'r Br. 2-3, 7 n.2, 28-29; Former N.J. Attnys. Gen. Br. 18 (reasonable suspicion *per se* based on offense); NACDL Br. 3 (same). Their rule is particularly unwieldy because offenses that they contend *automatically* trigger reasonable suspicion would not even subject an individual to arrest in certain jurisdictions. Compare, *e.g.*, Pet'r Br. 10, 32 (drug offenses), with *e.g.*, *State* v. *Taylor*, No. 94853, 2011 WL 1167645, at *5 n.3 (Ohio Ct. App. 2011) ("in certain quantities, marijuana possession is a minor misdemeanor and therefore a non-arrestable offense in the city of Cleveland"), and Cal. Health & Safety Code § 11357(b).

II. THE INTAKE SEARCHES AT ISSUE SATISFY THE FOURTH AMENDMENT.

Even if the Fourth Amendment applies here, the intake searches at issue are constitutional. These searches readily satisfy the governing standard for review of constitutional challenges to penological conditions announced in *Turner* v. *Safely*. Even without *Turner*, these "special needs" searches are constitutional under *Wolfish*'s balancing test that the Third Circuit applied.

A. Intake Searches Of All Newly Admitted Inmates Are Constitutional Because They Are "Reasonably Related To Legitimate Penological Interests."

The standard of review announced in *Turner* controls here, and under that standard, the intake searches at issue are constitutional because they are "reasonably related to legitimate penological interests." 482 U.S. at 89.

1. *Turner* Provides The Standard Of Review.

a. The *Turner* standard governs review of petitioner's Fourth Amendment challenge. In *Turner*, which involved alleged infringements of inmates' First Amendment rights, the Court undertook the "task ... to formulate a standard of review for prisoners' constitutional claims." *Id.* at 85. The Court stated that to the extent its prior "'prisoners' rights'" cases, *id.* at 87—including *Wolfish*, upon which it expressly relied—had left any question about the standard governing inmates' constitutional claims, the Court "resolve[d] it ... : when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

Turner's repeated reference to "prisoners' rights" and "constitutional claims" meant that the standard was to apply broadly. This Court subsequently "made quite clear that the standard of review ... adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights" and "not just those in which the prisoner invokes the First Amendment." *Washington* v. *Harper*, 494 U.S. 210, 224 (1990).[6] A different standard applies only when the particular right need not "necessarily be compromised for the sake of proper prison administration." *Johnson* v. *California*, 543 U.S. 499, 510 (2005).

The *Turner* standard applies here because the right at issue—privacy under the Fourth Amendment—is entirely "'inconsistent with proper incarceration.'" *Johnson*, 543 U.S. at 510; *Overton*, 539 U.S. at 131 (same). As shown *supra*, 19-21, *Hudson* held that the Fourth Amendment right to privacy is "fundamentally incompatible" with incarceration and its loss is "'inherent'" to confinement. 468 U.S. at 527-28. Administering a correctional facility is "'at best an extraordinarily difficult undertaking'" that "would be literally impossible to accomplish" if inmates retained traditional privacy rights. *Id.* at 527.

b. Petitioner's attempts to avoid *Turner* are unavailing. First, he states—without more—that this Court "has not held that the Fourth Amendment's

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[6] The standard applies equally to jails and prisons. In *Turner*, the Court identified *Wolfish* and *Block*, which exclusively involved jails, and *Jones* v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which involved prisons and jails, as three of the four cases that informed its understanding of "prisoners' rights." 482 U.S. at 86-87; *see Block*, 468 U.S. at 584, 586 ("reasonably related" test); *cf. Wolfish*, 441 U.S. at 561 (assessing due process challenge to searches under "rationally related" test).

application to jails and prisons is subject to the more deferential analysis of *Turner*." Pet'r Br. 19. But he ignores the language in *Turner* itself and this Court's above-quoted unequivocal statements regarding *Turner*'s scope. See *Harper*, 494 U.S. at 224. Indeed, the appeals courts have largely found that *Turner* governs Fourth Amendment claims. See Essex Opp. 11 & n.3 (filed Feb. 23, 2011) (Second, Fifth, Sixth, Ninth, and Tenth Circuits); see also *Del Raine* v. *Williford*, 32 F.3d 1024, 1041 n.6 (7th Cir. 1994); *accord Jordan* v. *Gardner*, 986 F.2d 1521, 1534-35 (9th Cir. 1993) (en banc) (Reinhardt, J., concurring) (*Turner* "established the general standard for evaluating prisoners' constitutional claims, including fourth amendment claims.").[7]

Petitioner's subsequent emphasis that *Turner* "applies '*only* to rights that are "inconsistent with proper incarceration,"'" Pet'r Br. 19, fares no better. He ignores *Hudson*'s holding that the assertion of a privacy claim severely interferes with proper jail administration. *Supra*, 19-21, 26; compare *Johnson*, 543 U.S. at 510-11 ("Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system").

Second, petitioner contends that neither *Turner*'s nor any special needs standard should apply to intake searches because they "generally occur before a magi-

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[7] The court below stated that, absent express direction from this Court, it would not find that "*Turner* supplanted [*Wolfish*]." Pet. App. 18a n.5. Similarly, the Eleventh Circuit declined to address whether the *Turner* approach "superseded" or "overruled" that in *Wolfish*. *Powell*, 541 F.3d at 1302-03. But as noted *supra*, 25-26 & n.6, *Turner* cited *Wolfish*'s institutional deference principles in announcing the test. *Turner* thus applied and clarified *Wolfish*; it did not supersede, overrule, or supplant it.

strate judge assesses whether there is probable cause for arrest" and before the "government's broad authority to impose punishment" attaches. Pet'r Br. 19-20; see *id.* at 30; see also Nat'l Police Accountability Project Br. 2, 6. Neither standard relies on the government's authority to punish inmates. In *Wolfish*, for instance, the Court explained that a hypothetical "right to be free from punishment" would not warrant a higher standard of scrutiny. 441 U.S. at 534. *Turner*, too, rested on "the need to reconcile ... the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Harper*, 494 U.S. at 223-24.

Moreover, petitioner's argument rests on a faulty premise because presentment to a magistrate is only necessary if the arrest was warrantless; if the arrest was executed pursuant to an arrest warrant, then the requirement of a neutral magistrate has been fully satisfied. *Gerstein* v. *Pugh*, 420 U.S. 103, 116 n.18, 124-25 (1975). Here, petitioner was arrested pursuant to a validly issued warrant executed by a State court, see J.A. 89a-90a, notwithstanding his distracting contention that he satisfied the fine underlying it, Pet'r Br. 3, 20. None of the *county* respondents here have anything to do with New Jersey's records systems that gave rise to his 2005 arrest. The jails have precisely the same penological concerns regardless of whether a new inmate was arrested pursuant to warrant. The standard by which their methods of ensuring these goals are furthered should not depend on the vagaries of a state's computer systems.[8]

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[8] The class certified at petitioner's request is not based on a distinction between individuals presented to a magistrate versus

Petitioner's rule suffers from additional flaws. It fails to recognize that the touchstone for the applicable standard of review is "the fact of confinement," *Wolfish*, 441 U.S. at 546; see *Overton*, 539 U.S. at 131-32, which may be met without presentment to a magistrate, *Cnty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991) (individual arrested without warrant may be held for at least 48 hours before presentment to a magistrate). Many individuals implicating the same institutional concerns are lawfully admitted to correctional facilities without presentment to a magistrate.

More fundamentally, petitioner's rule seeks to dictate through judicial decree the procedures for how correctional facilities deal with individuals based on the method of arrest—warrant versus warrantless, or whether presented to a magistrate. But this Court has consistently rejected such attempts to have courts manage correctional facilities. *Turner*, 482 U.S. at 89; *Wolfish*, 441 U.S. at 548.

For all these reasons, the *Turner* standard governs petitioner's Fourth Amendment challenge.

2. The Searches At Issue Satisfy *Turner*.

Under *Turner*, the searches at issue are constitutional because they are rationally related to Essex's important penological goals of securing the health, safety, and security of inmates and staff. *Turner* instructs that this Court will "accord substantial deference to the professional judgment of prison administrators," and will uphold searches that "bear a rational relation to legitimate penological interests." *Overton*, 539 U.S. at 132; see *Turner*, 482 U.S. at 89. The "burden" is not on the correctional facility "to

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those who have not. Nor has he distinguished between individuals arrested pursuant to a warrant and those who have not.

prove the validity" of a condition or restriction but on the inmate "to disprove it." *Overton*, 539 U.S. at 132.

Four factors are potentially relevant to determining the reasonableness of the condition or restriction. First, the Court assesses whether the search has a "'valid, rational connection'" to a "legitimate government interest." *Turner*, 482 U.S. at 89; see also *Overton*, 539 U.S. at 132. The "logical connection" cannot be "so remote as to render the policy arbitrary or irrational," and the objective "must be a legitimate and neutral one." *Turner*, 482 U.S. at 89-90. Second, the Court may assess "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court examines the impact "an accommodation of the right" would have on guards, inmates, and the resources of a correctional facility. *Overton*, 539 U.S. at 132; *Turner*, 482 U.S. at 90. Fourth, the Court looks for "ready alternatives" to the regulation. *Turner*, 482 U.S. at 90. This last factor is not "a 'least restrictive alternative' test." *Id.* Rather, the Court assesses whether "an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91.

Petitioner cannot carry his burden of disproving the existence of such interests; the intakes searches at issue readily satisfy this test.

a. First, there is an unquestionably valid, rational connection between these searches and Essex's legitimate interest in protecting inmates and staff. The Court repeatedly has reaffirmed that ensuring the health, safety, and security of inmates and jail staff are valid, neutral, and legitimate objectives. *E.g.*, *Overton*, 539 U.S. at 133; *Harper*, 494 U.S. at 225; *Hudson*, 468 U.S. at 528; *Wolfish*, 441 U.S. at 561. Furthermore, jails and prisons have an "obligation to

provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution," and administrators "have ... an interest in ensuring the safety of prison staffs and administrative personnel," as well as "the duty to take reasonable measures for the prisoners' own safety." *Harper*, 494 U.S. at 225.

It is also indisputable that the introduction of contraband jeopardizes these legitimate objectives, and visual body-cavity and strip searches are a valid, rational means of eliminating this danger. "Jails are designed to be clean and clear of contraband at all times" in order to ensure the safety of inmates and jail staff. J.A. 382a, 385a. The introduction of any contraband can be disastrous. Of course, "[d]rug smuggling and drug use"—which involve just one form of contraband—"are intractable problems" for jails and prisons. *Overton*, 539 U.S. at 134; *Block*, 468 U.S. at 588-89. Moreover, even seemingly innocuous items can be fashioned into weapons or merchandise that can be bartered or used to disrupt the health or safety of inmates and staff. See, *e.g.*, CA3 App. 377-79; *supra*, 3.

Strip searching individuals upon intake into jails is a rational response to these problems because it is widely acknowledged that "[c]ontraband control begins at an inmate's intake." Gregory Gearhart, *Controlling Contraband*, 68 Corrections Today 6, 6 (2006). As petitioner's expert has explained, "[w]hen an inmate is admitted to a correctional facility through a process commonly referred to as 'intake,' there is a significant risk that contraband may be brought into the facility," and, thus, the "process of admitting a new inmate to a correctional facility requires a concerted effort to prevent the introduction of contraband into the facility." J.A. 350a. Essex's ex-

pert and others agree. *Id.* at 384a ("the admission process at a jail is far more dangerous than at a prison"); *id.* at 386a ("The admissions area is clearly a pathway through which prisoners and contraband travel into a jail."); *accord Bull* v. *City & Cnty. of S.F.*, 595 F.3d 964, 966-67 (9th Cir. 2010) (en banc). ECCF itself has found contraband "on newly admitted inmates." J.A. 71a.

And according to petitioner's expert and others, strip searching "every individual taken into custody .... would be the most effective way of keeping contraband out of the jail." J.A. 344a-45a; *accord Dodge*, 282 F. Supp. 2d at 49 ("All jail personnel who testified at this trial, including plaintiffs' expert ... testified that, if they could, they would strip search every newly arrived inmate, regardless of what brought him or her to their facility, in order to minimize the risk of introduction of contraband."). In Essex's experience, "contraband is traditionally hidden on the person," in "their clothing," "hair," or "underwear." J.A. 71a. Thus, ECCF's intake procedure reasonably requires newly admitted inmates to remove and deposit their clothing into bins, which officers then search for contraband. *Id.* at 271a-72a, 284a-86a, 305a-07a, 325a; see also Pet. App. 142a (§ B.6-8, which describes procedures for searching clothing, wallets and other personal effects). In furtherance of Essex's legitimate health objectives,[9] new inmates then take showers, which officers monitor "to deter any problems that might happen or occur." J.A. 317a; see *Timm*, 917 F.2d at 1101-02 (monitoring jail showers protects against sexual assault); Human Rights

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[9] As petitioner's *amici* explains, proper hygiene for inmates—including a prompt "opportunity to shower" like petitioner had at Essex—is critical to preventing the spread of disease in jail. Med. Soc. NJ Br. 16.

Watch, *No Escape: Male Rape in U.S. Prison*, chs. IV n.208, V (2001).

The visual body-cavity searches that petitioner alleges he underwent at ECCF would also be rationally related to Essex's legitimate penological interests. In *Wolfish*, for instance, this Court credited correctional officials' testimony that "visual cavity searches were necessary" to discover certain contraband and to deter attempts to smuggle contraband. 441 U.S. at 558; see *id.* at 559 n.40. In Essex's experience, contraband is often found in an inmate's "mouth" or "in an orifice," and "detainees have become more ingenious as to where they hide contraband." J.A. 71a. Other jurisdictions report similar experiences. See generally *Wolfish*, 441 U.S. at 559 (justification for search policy can be found "in this record and in other cases" (citation omitted)).

For instance, the Ninth Circuit recognized that San Francisco's strip- and visual body-cavity searches led to the discovery of significant amounts of contraband "'hidden in body cavities,'" including "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana." *Bull*, 595 F.3d at 969. Similarly, Judge Patel upheld strip- and visual body-cavity search policies that had uncovered dozens of instances of contraband, including that "concealed within body cavities." *Johannes* v. *Alameda Cnty. Sheriff's Dep't*, No. C04-458MHP, 2006 WL 2504400, at *4 (N.D. Cal. Aug. 29, 2006), *aff'd*, 270 F. App'x 605, 606 (9th Cir. 2008) (per curiam); see *id.* at *4-6 (crediting officer and expert testimony regarding the effectiveness and deterrent effect of strip searches).

Furthermore, petitioner's expert acknowledged that merely conducting brief visual observations of inmates while showering, rather than the types of "thorough" searches at issue in *Wolfish*, "exposes other

offenders to dangerous contraband." J.A. 371a-72a. Additionally, the unrebutted opinion of Essex's expert, Dr. Camp, establishes that "visual body searches are a most effective deterrent to preventing the introduction of contraband into a jail." *Id.* at 382a. He explained that "[i]f ... inmate[s] know[] they will most certainly undergo a visual body search each time they enter the jail, the amount of contraband that actually enters the jail is reduced considerably." *Id.*; see *Wolfish*, 441 U.S. at 558.

This record amply demonstrates that a visual body-cavity search is a logical means to uncover hard-to-find contraband on an inmate's person. Cf. *Wolfish*, 441 U.S. at 559 (upholding policy notwithstanding "there ha[d] been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person").

Performing these searches on non-indictable, not just indictable, arrestees is equally rational. This Court has consistently held that there is no basis to distinguish between detainees based on the reason for their confinement. See *Block*, 468 U.S. at 587; *Wolfish*, 441 U.S. at 546 n.28. The assertions by petitioner and his *amici* that there is no "'opportunity'" for misdemeanor arrestees to obtain and secret contraband ignore this principle, the record, and the nature of jails generally. See, *e.g.*, Pet'r Br. 36-38; Former N.J. Attnys. Gen. Br. 22-25; ABA Br. 9; see also *Bull*, 595 F.3d at 998 (Thomas, J., dissenting) (claiming there is no opportunity to hide something). For instance, Dr. Camp explained that the "charge pending against the inmate simply is not reflective of the danger that the inmate poses to a jail, its staff or inmate population." J.A. 380a. Non-indictable arrestees "can be more dangerous" once "everyone knows" that

they will not be searched because they may be used to smuggle in contraband. *Id.*[10]

Moreover, "[p]re-arrival contact" during the intake process "provides opportunity for felons to give contraband to misdemeanants to avoid detection." J.A. 381a. Petitioner, for example, was exposed to many other offenders before being searched by ECCF, and another plaintiff acknowledged that he was held in the waiting room with 30-some inmates, including those arrested on violent charges. *Supra*, 4, 7; see also *Bull*, 595 F.3d at 979-80 (discussing arrestees' opportunities to smuggle). Requiring jails' search policies to distinguish between categories of arrestees is extremely burdensome, and moreover, it is "not unreasonable to assume" that felony-arrestees—knowing that they alone will be subjected to extensive search—would threaten misdemeanants to secrete their contraband through the search process and return it once they entered the general population. See *Block*, 468 U.S. at 587.

Petitioner's arguments regarding a purported lack of opportunity should be rejected for additional reasons. "Not everyone who is arrested is surprised," and "there are plenty of situations where arrestees would have had at least as much opportunity to conceal contraband as would inmates on a contact visit." *Powell*, 541 F.3d at 1313-14; see Pet. App. 23a-25a. Petitioner's expert has testified that "[a]ny time you have a ... planned reporting to a correctional environment, ... the person ... can secret contraband on their

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[10] Further, Essex must be able "to protect against potential suicides," and the level of offense gives ECCF no indication of who may commit suicide and who might have the contraband necessary to do so. J.A. 382a; *see Bull*, 595 F.3d at 966-67 (detainee "attempted suicide with razor-blades smuggled into the jail in his rectal cavity").

body." J.A. 344a. Additionally, petitioner is unduly dismissive of the likelihood that to serve their interests in injecting contraband into correctional facilities, gangs—which do not blanch at requiring their members to commit grievous acts as part of initiation rites—would instruct their members to undergo misdemeanor arrests to facilitate smuggling. See *Powell*, 541 F.3d at 1311; cf. *Block*, 468 U.S. at 588 (discussing recruiting of low-level detainees to facilitate smuggling). Finally, petitioner's and his *amici*'s "lack of opportunity" arguments are logically incoherent. They fail to explain why felon arrestees, whom they concede can be subjected to such searches, have any more (or less) opportunity to secrete contraband before admission.

b. The second potential factor—whether an alternative means of exercising the right exists—is not relevant in every case that *Turner* governs and should not be applied here. For instance, in *Harper*, the Court held that the second factor was irrelevant to analyzing whether providing antipsychotics to an inmate against his will deprived him of due process. 494 U.S. at 224-25. There, the inmate had no alternative way to assert the right to refuse the antipsychotics; it was the crux of his complaint. See *id.* The second factor makes little sense when the objective of a challenged policy is to deprive the inmate of a particular right. *Beard* v. *Banks*, 548 U.S. 521, 541 (2006) (Thomas, J., concurring in judgment). Thus, the Ninth Circuit has long held that the factor does not apply to strip- and visual body-cavity searches alleged to violate the Fourth Amendment. *Bull*, 595 F.3d at 973 n.9; *Michenfelder* v. *Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988). This Court should hold likewise.

Even if the second factor applies, inmates have alternative means of exercising whatever residual privacy right they may maintain. This factor turns on whether inmates have alternative means to exercise the deprived right in general. It was, therefore, sufficient that prisoners "retain[ed] the ability to participate in other Muslim religious ceremonies," despite having "no alternative means of attending Jumu'ah," a weekly Muslim service. *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 351-52 (1987); see also *Overton*, 539 U.S. at 135. Here, inmates cannot avoid the loss of privacy during the intake searches, but they can exercise a general right of privacy. For instance, Essex gives each inmate a jumpsuit, towels for after showers, and bed linens, all of which protect their bodily privacy while confined.

c. Third, the impact of accommodating the privacy right that petitioner advances weighs in favor of the reasonableness of the searches. Both experts in this case agree that failing to perform strip- or visual-body-cavity searches results in an increase in the amount of contraband that enters jails. See, *e.g.*, J.A. 345a, 385a. Petitioner's right to be free of these searches thus jeopardizes the health, safety, and welfare of inmates and jail staff.

There are other negative effects of accommodating petitioner's asserted right. As Dr. Camp explained, jail officials will increase the number of pat-down searches and cell shakedowns in an effort to weed out the influx of contraband. This in turn leads to "increased confrontations between inmate[s] and correctional staff that would be unnecessary if strip-searches on all arriving inmates were allowed." J.A. 386a. Moreover, accommodating petitioner's proposed rule would require a significant reallocation of jail resources. See *Overton*, 539 U.S. at 135. Jail officers not

familiar with distinguishing between types of crimes would need training, *e.g.*, J.A. 266a, and entire intake procedures may need to be altered so that officers have an opportunity to determine who may and who may not be searched without reasonable suspicion. See also *Bull*, 595 F.3d at 984-85, 987 (Kozinski, C.J., concurring) (discussing difficulty of administering classification system). By contrast, under respondents' approach, no correctional facility that does not currently perform intake strip- or visual body-cavity searches would be compelled to do so.

d. Fourth, petitioner cannot show an alternative that accommodates the right he seeks at *de minimis* cost to Essex's valid penological interests. Petitioner asserts without support that requiring reasonable suspicion before searching (strip or otherwise) incoming inmates will catch most of the contraband and that this should be used instead of a blanket policy. Pet'r Br. 28. This is not a cost-free alternative. Dr. Camp's expert opinion establishes that requiring reasonable suspicion before searching incoming inmates prevents jails from detecting contraband. J.A. 384a. Non-indictable arrestees could "secret[ ] contraband," which "causes significant security problems that jails, despite their best efforts, cannot solve unless they are permitted to conduct visual body searches on all arriving inmates." *Id.*

Nor are pat-downs, metal detectors, or other devices plausible alternatives to the searches at issue. Pet'r Br. 28, 31-32. As this Court has recognized, metal detectors "simply would not be as effective as the visual inspection procedure." *Wolfish*, 441 U.S. at 559 n.40. Such devices only detect metal objects, not numerous other types of contraband. *Id.*; J.A. 58a, 71a, 334a. The experts in this case agree that the searches at issue are more effective than the alterna-

tives suggested by petitioner. J.A. 344a-45a, 385a. None of these suggested alternatives will therefore have a "*de minimis*" impact on Essex's legitimate penological interests.

Because the searches at issue are reasonably related to ECCF's legitimate penological interests, the judgment should be affirmed.

B. Under *Wolfish*, Strip- and Visual Body-Cavity Searching All Newly Admitted Inmates Is Reasonable.

Even if the Court does not apply *Turner*, *Wolfish* also compels the conclusion that conducting strip- and visual body-cavity searches of all newly admitted inmates into a prison or jail is reasonable under the Fourth Amendment.

1. *Wolfish* Established A Special Needs Exception Applicable Here.

The Fourth Amendment does not always require probable cause or even individualized reasonable suspicion to conduct searches. Rather, "[no] measure of individualized suspicion[ ] is an indispensable component of reasonableness." *Nat'l Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). This Court repeatedly "ha[s] upheld suspicionless searches" when, as here, they serve an institution's "special needs" rather than law enforcement or investigatory purposes. *Vernonia*, 515 U.S. at 655-56 (collecting cases); see also *Bull*, 595 F.3d at 983 (Kozinski, J., concurring) (collecting cases). In the correctional context, *Wolfish* is in effect a specific application of the broader principles enunciated in *Turner*, even though *Wolfish* was decided first. But the analyses in the two cases dovetail, which is why ultimately the outcome is the same under both standards.

Wolfish held that strip- and visual body-cavity searches at correctional facilities present a "special needs" exception to the Fourth Amendment's usual requirements of probable cause or individualized suspicion. See *Skinner*, 489 U.S. at 619-20 (listing *Wolfish* among "special needs" decisions). In *Wolfish*, inmates alleged that, *inter alia*, the federal Metropolitan Correctional Center's policy of conducting strip- and visual body-cavity searches on every inmate following a contact visit with outsiders violated their Fourth Amendment rights. 441 U.S. at 555-58. This Court disagreed. *Id.* at 558-60. Recognizing the "unique[,] ... serious security dangers" facing jail administrators and the "wide-ranging deference" provided to them, *id.* at 547, 559, this Court "rejected the case-by-case approach to the 'reasonableness' inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion," *Hudson*, 468 U.S. at 538 (O'Connor, J., concurring); *accord Vernonia*, 515 U.S. at 664 n.3 (*Wolfish* "displays no stronger a preference for individualized suspicion than we do today."); *Wolfish*, 441 U.S. at 563 (Powell, J., dissenting) (criticizing the majority for not requiring "at least some level of cause, such as a reasonable suspicion").[11]

Under *Wolfish*, like other special needs cases, the Fourth Amendment analysis requires "balancing ... the need for the particular search against the invasion of personal rights." *Wolfish*, 441 U.S. at 559; see, *e.g.*, *Vernonia*, 515 U.S. at 652-53 (drug-testing in schools); *Skinner*, 489 U.S. at 619-20 (drug-testing

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[11] Although initially petitioner mistakenly contends that *Wolfish* applied "ordinary Fourth Amendment principles," Pet'r Br. 18, he eventually concedes that *Wolfish* "rejected the lower courts' ruling that such searches always require individualized suspicion," *id.* at 36.

railroad workers); *Colorado* v. *Bertine*, 479 U.S. 367, 371-72 (1987) (inventory search of automobile).

This "special needs" framework governs here and justifies ECCF's policy. Although petitioner argues (at 20) that "'the Fourth Amendment's normal requirement of individualized suspicion'" should apply, he fails to show why the special needs framework does not fit. The alleged searches here serve quintessential special needs as they did in *Wolfish*. This Court already has recognized that correctional facilities must "take all necessary steps to ensure the safety" of staff, inmates and visitors, which require that such facilities "be ever alert to" the introduction of "contraband into the premises." *Hudson*, 468 U.S. at 526-27; see also *Samson*, 547 U.S. at 847; *Block*, 468 U.S. at 587-88.

2. The Searches At Issue Are Reasonable Under *Wolfish* And, Therefore, Constitutional.

The intake searches at issue are constitutional under the special needs framework because the interests at stake are essentially indistinguishable from those in *Wolfish*. The Court must consider four factors: (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted," (3) "the place in which it is conducted," and (4) "the justification for initiating it." *Wolfish*, 441 U.S. at 559.

a. Each of these factors weighs as much in Essex's favor as each did for the jail in *Wolfish*, some even more so.

First, the scope of the particular intrusion supports the reasonableness of ECCF's intake searches. As the Third Circuit recognized, the strip-searches that are the subject of the class's claim are "less intrusive than the visual body-cavity searches" at issue in *Wol-*

fish. Pet. App. 19a. Unlike the searches in *Wolfish*, the classmembers claim that the Fourth Amendment was violated by merely "requir[ing] [them] to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower." *Id.* These actions are thus akin to the strip searches upheld by the district court in *Wolfish* (rather than the visual body-cavity searches it found problematic and were before this Court). As lower courts have recognized, it "is [not] open to serious dispute that inmates of the same sex may be required to shower together and that guards of that sex may watch them while they are showering to prevent any misconduct," and, thus, it "necessarily follows that this type of visual strip search is not unconstitutional." *Powell*, 541 F.3d at 1313 n.6; *accord Phelan*, 69 F.3d at 146; *Timm*, 917 F.2d at 1101-02.

Petitioner's individual claim regarding alleged visual body-cavity searches (at 5-6, 10, 26-27, 32) fares no better. That claim implicates a search no more intrusive than those *Wolfish* upheld. See 441 U.S. at 577 (Marshall, J., dissenting) (searches required men to "raise their genitals," "bend over, spread the buttocks, and display the anal cavity for inspection," and women to "assume a suitable posture for vaginal inspection"); see also *Bull*, 595 F.3d at 968-69 & n.4, 975.[12]

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[12] Petitioner and *amici* assert that these types of searches may be especially traumatic for certain individuals. Pet'r Br. 23-24; Former N.J. Attnys. Gen. Br. 28-29; Psychiatrists Br. 9-11. While any such unique effects are unfortunate, petitioner has no similar allegation of extreme emotional or psychological harm here. Nor does this case involve aggravating circumstances. *See supra*, 7-8. At bottom, petitioner's and his *amici*'s claims about the alleged potential for psychological harm associated with the alleged searches here—indistinguishable from those in *Wol-*

Despite the parallels between this case and *Wolfish*, petitioner contends that the scope of intrusion here "produce[s] a different result" because the inmates in *Wolfish* had "no constitutional right to engage in contact visits," and thus their choice to exercise a "privilege" rather than a "right" resulted in a lessened expectation of privacy. Pet'r Br. 37. Petitioner's proposed distinction rests on a faulty premise. *Wolfish* upheld the searches on the express understanding that "the Court of Appeals, in a ruling that [was] not challenged in this Court ..., held that pretrial detainees have a constitutional right to contact visits." 441 U.S. 560 n.40. There is no basis to distinguish the intrusiveness of the searches at issue, regardless of what later cases may have said. See Pet'r Br. 37.

Second, the manner in which the searches allegedly were conducted is not meaningfully different from those in *Wolfish*. In both cases, searches were carried out "by correctional officers at a detention facility." Pet. App. 19a. Here, new inmates are shown to an individual shower stall, where they remove their clothing, hand it to a guard, and shower. Officers only monitor showering inmates as necessary to "deter any problems." J.A. 317a. Even according to petitioner's allegations, the visual body-cavity searches occur when the inmate showers, and he is quickly instructed to don a uniform.

Petitioner's attempt to distinguish this case from *Wolfish* on this second factor is unavailing. He contends that his experience was particularly "'humiliating and degrading'" because he was required to "appear naked in front of multiple officers and several

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fish—are an effort to overrule *Wolfish* without assuming the heavy burden necessary for this Court to reject *stare decisis*.

other arrestees." Pet'r Br. 26-27. Setting aside the factual dispute regarding how the intake searches at ECCF occurred, the *Wolfish* plaintiffs made identical allegations about the lack of privacy. See 441 U.S. at 577 (Marshall, J., dissenting) ("[T]his humiliating spectacle is frequently conducted in the presence of other inmates."). The presence of other individuals did not "render[ ] ... [the policy] unreasonable," Pet'r Br. 26, in *Wolfish* and does not do so here. After all, *Wolfish* made clear that the "[l]oss of freedom of choice and privacy are inherent incidents of confinement." 441 U.S. at 537; *accord Hudson*, 468 U.S. at 528.

Third, the "place" where the alleged searches were conducted mirrors that in *Wolfish*. The searches occurred in a detention facility, which raises "unique" security interests. *Wolfish*, 441 U.S. at 559. Moreover, "[a] detainee simply does not posses the full range of freedoms of an unincarcerated individual." *Id.* at 546.

Finally, the justification for the searches supports the reasonableness of ECCF's policy for the same reasons it did in *Wolfish*. A detention facility is "a unique place fraught with serious security dangers," 441 U.S. at 559, and petitioner rightly concedes that "smuggling into jails is a significant problem." Pet'r Br. 31 (citing *Wolfish*, 441 U.S. at 559). The same considerations identified *supra* § II.B.2 in showing that the searches are rationally related to a legitimate penological interest in preventing contraband likewise demonstrate that the intake searches are reasonable. Petitioner cannot escape the fact that "[e]nsuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." *Wolfish*, 441 U.S. at 561.

b. Petitioner attacks on Essex's justifications for its intake policy are meritless.

First, petitioner makes the incredible assertions that ECCF's intake searches cannot "deter smuggling," because ECCF's policy forbids suspicionless searches, and ECCF's searches are not "calibrated to uncover contraband, absent reasonable suspicion." Pet'r Br. 27-28. The only basis for arguing that ECCF's policy forbids the searches here is the assertion that ECCF "adopted [this] policy after the events of this case." *Id.* at 28. But the issue is whether the alleged searches are objectively justifiable under the Fourth Amendment, see, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 812 (1996), not how Essex may have changed its search policies afterward.

As for petitioner's claim that ECCF's searches are not designed to uncover contraband, he both misunderstands the Fourth Amendment analysis and takes undue liberty with the record. Again, why the searches were conducted "is irrelevant." *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006); *accord Whren*, 517 U.S. at 812. All that matters is whether "'the circumstances, viewed *objectively*, justify the action.'" *Brigham City*, 547 U.S. at 404 (alteration omitted). Moreover, according to the ECCF's policies and practices that the lower courts relied upon, the strip searches unquestionably were intended to uncover contraband. Officers instructed inmates to remove their clothing under close observation and place the clothing in a bin, which was then thoroughly searched for contraband. Pet. App. 141a-42a; J.A. 286a, 305a-07a, 309a, 311a, 325a. If Mr. Florence underwent a visual body-cavity search pursuant to Essex's written-policy, as petitioner contends, that

search also served the purpose of uncovering contraband. See, e.g., J.A. 338a, 323a; Pet. App. 141a-42a.[13]

Second, petitioner erroneously claims that the Court can "assume" that it will be "rare" that non-indictable arrestees will get arrested in order to smuggle in contraband, see Pet'r Br. 28-31, and pretends—contrary to the record—that individuals subjecting themselves to intentional arrests present the only opportunity for new inmates to import contraband following arrest, *id.* at 37-39.

These arguments fly in the face of the unrebutted showings, *inter alia*, that contraband is recovered on admission, that misdemeanants present no lesser risk, that intermingling between inmates before intake searches heightens the risks, that misdemeanants would be recruited to smuggle if not subject to search, and that searching all new inmates is necessary effectively to stop the flow of contraband. *E.g.*, *supra*, 3, 11, 31-36; J.A. 380a-81a, 344a-45a (unrefuted opinions of Essex's expert Dr. Camp and petitioner's own expert). These unopposed showings establish that ECCF faces an opportunity for smuggling not materially distinct from *Wolfish*. This Court should reject petitioner's attempt to mount the challenge he forfeited in the district court.

Additionally, this attack falters because this Court has—consistent with the evidence in this case—

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[13] Unless the Court agrees that, as respondents maintain, the strip- and body-cavity searches are both constitutionally permissible, a remand is necessary to resolve the factual disputes between the parties concerning whether petitioner was subjected to a visual body-cavity search, as well as the scope of any such search. *Compare supra*, 3-5, *with id.* at 7-8; *see also, e.g.*, J.A. 265a, 273a, 281a, 284a, 291a-92a, 306a-14a, 318a (Essex officers' testimony suggesting that a visual body-cavity search was not conducted).

rejected the notion that the security risk presented by inmates can be based on the reason for their detention. *Wolfish*, 441 U.S. at 546 n.28 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates."); see also *Block*, 468 U.S. at 587; *accord Powell*, 541 F.3d at 1309-12; *Kennedy* v. *L.A. Police Dep't*, 901 F.2d 702, 713-14 (9th Cir. 1990) ("a crime's classification as a felony or a misdemeanor alone cannot reasonably forecast an arrestee's stealthful proclivities"), *overruled on other grounds by Act Up!/Portland* v. *Bagley*, 971 F.2d 298 (9th Cir. 1992); *Shain* v. *Ellison*, 273 F.3d 56, 70 (2d Cir. 2001) (Katzmann, J., concurring); *Arruda*, 710 F.2d at 887-88 (Breyer, J.); BOP, Program Statement 5800.12, § 501 (1998) (stating that "[d]etention facilities receive many inmates directly from the community with often little or no background information ..., extreme caution must be exhibited and all inmates must be processed as if they are maximum custody inmates").

Third, relying on the federal government's search policies, as well as various states' laws governing searches, petitioner argues that suspicionless intake searches of inmates arrested for minor offenses do not serve institutional needs and thus individualized suspicion is required. Pet'r Br. 27, 28-29. The sources he cites do not support the standard he promotes.

Petitioner, for example, falsely claims that "[e]very relevant division of the U.S. Department of Justice concurs" with his view that suspicionless searches of minor offenders are unnecessary and instead individualized suspicion is required. Pet'r Br. 14; see *id.* at 29. Even if this Court could ignore the likelihood that whatever policies the federal government adopted reflected the circuits' constitutional rulings prior to the Eleventh Circuit *en banc* decision in *Powell*, see Pet.

for Cert. 13-16, neither the Marshals Service (USMS) nor the Bureau of Prisons (BOP), for instance, takes the categorical position outlined by petitioner.

While suggesting that USMS always requires individualized reasonable suspicion to conduct strip- and visual body-cavity searches, see Pet'r Br. 14, petitioner later quotes without discussion USMS's policy that, in fact, permits strip- and visual body-cavity searches based on no more than the "'[t]ype and security level of institution in which the prisoner is detained'" or a "'[h]istory of discovery of contraband ... *either* on the prisoner individually *or in the institution* in which prisoners are detained,'" *id.* at 33 n.12 (quoting USMS Service Directive § 9.1(E)(3) (2010)) (emphasis added). This is the antithesis of a policy requiring individualized suspicion to search inmates arrested for minor offenses.

Indeed, petitioner fails to acknowledge that in defending its visual body-cavity searches of misdemeanor arrestees on qualified immunity grounds, USMS quoted the very language noted above and stated that its "policy itself, like *Bell* [v. *Wolfish*], specifically permitted a categorical analysis of the need to conduct a strip search." Br. for Appellant at *31, *Bame* v. *Dillard*, 637 F.3d 380 (D.C. Cir. 2011) (No. 09-5330), *available at* 2010 WL 5675793; see *Bame*, 637 F.3d at 386 (granting summary judgment based on qualified immunity and noting that "nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility").

Additionally, contrary to petitioner's claims (at 14), BOP's regulations permit "a visual search [*i.e.*, visual body-cavity search] where there is a reasonable belief that contraband may be concealed on the person, *or a good opportunity for concealment has occurred.*" 28 C.F.R. § 552.11(c) (emphasis added); see BOP, Pro-

gram Statement 5521.05, § 6(b)(1) (1997) (discussing regulation); *Powell*, 541 F.3d 1308-09 (same, and concluding that a "'good opportunity'" exists "when an inmate is processed into the facility for the first time"). Furthermore, any inmate not subjected to a visual body-cavity search "must be housed in an area separate from all other inmates." BOP, Program Statement 7331.04, § 9(b) (2003).

Petitioner's invocation of state law also fails to support his plea for individualized suspicion in the face of the jails' institutional interests. See Pet'r Br. 15 & n.6. The overwhelming majority of states do not require probable cause or individualized suspicion to conduct strip- and visual body-cavity searches. As to the 17 state provisions petitioner references, *nine* seemingly would not apply to the circumstances presented here.[14] Moreover, contrary to petitioner's arguments, New Jersey did not unequivocally prohibit the searches alleged here. The parties disputed below whether state law was violated. See Appellants' Br.

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[14] Four states permit visual searches at intake prior to joining the general jail population. *See* Ohio Rev. Code Ann. § 2933.32(A)(2), (B); Va. Code Ann. § 19.2-59.1(G); Kan. Stat. Ann. § 22-2524(b); *Bull* v. *City & County of San Francisco*, No. C 03-01840 CRB, slip. op. at 20-23 (N.D. Cal. Sept. 22, 2005) (regarding Cal. Penal Code § 4030). Several more exempt persons detained or remanded pursuant to a court order and thus may not apply to searches of detainees, like petitioner, arrested pursuant to a bench warrant. *See* Conn. Gen. Stat. § 54-33*l*(g); 725 Ill. Comp. Stat. 5/103-1(j); 26-239-1 Me. Code R. §§ I, V; *see also* Va. Code Ann. § 19.2-59.1(E). In Tennessee, once an arrestee is transferred to jail custody, the regulations give additional discretion to jail administrators and require consideration of institutional factors in assessing the reasonableness of the search. Tenn. Code Ann. § 41-4-140(a)(1)-(2); Tenn. Corr. Inst. R. 1400-1-.07(1)-(5). And Kentucky provides that reasonable suspicion arises when, as here, an inmate is "transport[ed]" from one institution to another. 501 Ky. Admin. Regs. 3:120 § 3(1)(b)(4).

at *17, *Florence*, 621 F.3d 296 (3d Cir. 2010) (No. 09-3661), 2009 WL 6842032 (arguing compliance). Moreover, petitioner concedes that New Jersey authorizes strip searches of arrestees "who have a history of violence or a prior criminal conviction," Pet. for Cert. 20, but fails to mention that he was arrested and charged with a violent felony before ultimately pleading guilty to a lesser offense, *supra*, 6; *Sykes*, 131 S. Ct. at 2273. Additionally, petitioner and his *amici* neglect to mention that the state law provision upon which he relies, N.J. Stat. Ann. § 2A:161A-1(b), is subordinate to "any procedures of the State's penal institutions," *id.* § 2A:161A-9, which include ECCF and its written policies about which petitioner complains. See *State* v. *Hughes*, 553 A.2d 349, 353 (N.J. Super. Ct. App. Div. 1989) (jails are "not only ... county institution[s] but [are] also part of the State's overall complex of correctional facilities"); Pet. App. 92a (similar).

Fourth, petitioner highlights the district court's odd statement that "respondents produced no evidence 'that detail[s] evidence of a smuggling problem specific to their respective facilities.'" Pet'r Br. 29 (alteration in original). As even the district court recognized, Pet. App. 87a, *Wolfish* does not impose such a requirement. Moreover, it is indisputable that contraband smuggling is a problem for all jails, *supra*, 3, 31, *and* Essex submitted a memorandum stating that "contraband [is] found on a daily basis" at ECCF, including on "newly admitted inmates." J.A. 70a-71a. There is no basis to deny that contraband smuggling presents a serious risk for Essex and justifies the search policies.

Fifth, petitioner suggests that "numerous alternatives exist" to the intake searches at ECCF and that this undermines ECCF's justifications for its policy.

Pet'r Br. 31-34. *Wolfish* rejected this line of argument, explaining that "[g]overnmental action does not have to be the only alternative or even the best alternative to be reasonable, to say nothing of constitutional." 441 U.S. at 542 n.25; see *id.* at 551 n.32. The Court has since repeatedly rejected a less intrusive means requirement. *E.g.*, *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2632 (2010); *Hudson*, 468 U.S. 527-28; *Block*, 468 U.S. at 590 n.10. Regardless, petitioner's claims fail because, as *Wolfish* recognized, "assuming that the existence of less intrusive alternatives is relevant ... , [they] would not be as effective." 441 U.S. at 559 n.40; see J.A. 71a, 386a; *supra*, 36-37. Petitioner's argument thus improperly invites the Court to inquire "how best to operate a detention facility" rather than to apply "constitutional requirements." *Wolfish*, 441 U.S. at 539.

Finally, petitioner asserts that "if respondents were correct that suspicionless strip searches are necessary to deter the smuggling of contraband into jails, there would be evidence of that fact from other facilities around the country in which that practice has been banned for decades." Pet'r Br. 39. Again, petitioner ignores the record. Dr. Camp—unrebutted—explained that the searches alleged here "provide an essential deterrent to inmates who are considering whether to try to smuggle contraband into a correctional facility." J.A. 382a, 385a. Furthermore, it would be extraordinarily difficult to demonstrate precisely how contraband entered a facility once inside or the extent to which a particular policy has deterred smuggling, and this Court has never required such showings in crediting the interest in deterrence. See *Wolfish*, 441 U.S. at 559; *Block*, 468 U.S. at 587-89. To the extent that petitioner suggests that conducting strip searches is an "exaggerated ... re-

sponse" to the problem, he has "not met [his] heavy burden" of showing this to be the case. *Wolfish*, 441 U.S. at 561.

Ultimately, petitioner fails to offer any meaningful way to distinguish *Wolfish*. Accordingly, the Court should affirm the Third Circuit because the privacy intrusion occasioned by the intake searches at issue is outweighed by jails' institutional interests. *Id.* at 558.

III. IN ALL EVENTS, ESSEX IS ENTITLED TO SUMMARY JUDGMENT BECAUSE SUBJECTING TRANSFEREES TO THE SEARCHES SATISFIES *TURNER* AND *WOLFISH*.

Summary judgment for Essex can be affirmed on the independent ground that strip- and visual body-cavity searches of inmates, like petitioner, transferred from other correctional facilities satisfy *Turner* and *Wolfish*. Transferees have greater opportunity to smuggle contraband than individuals confined immediately after arrest and greater need to secrete the contraband.

Prior to his transfer to ECCF, petitioner was confined at BCJ for six days and intermingled with other inmates in the jail. Pet. App. 3a, 51a-52a. Petitioner alleges that following his transfer to ECCF, he was strip-searched and subjected to a visual body-cavity search.

Assuming the Fourth Amendment applies, searching petitioner upon his transfer to ECCF was constitutional. Whatever the merits of petitioner's and his *amici*'s suggestions about the implausibility of newly arrested individuals secreting contraband prior to search, see, *e.g.*, Pet'r Br. 29, 38-39; NACDL Br. 2, 9; Former N.J. Attnys. Gen. Br. 22-25, the argument

has no force in the post-transfer setting. This is because detainees have access to contraband in transferor institutions, see, *e.g.*, *Wolfish*, 441 U.S. at 559, and their lack of privacy while confined makes it imperative to conceal such contraband on and in their persons. As another court recently explained, "'[a] detainee who has been incarcerated in another facility has potentially been exposed to contraband, especially if the facility has lenient procedures with respect to court appearances, contact visits, medical programs, and work programs.'" *Jackson* v. *Herrington*, No. 4:05-cv-186, 2008 WL 1897729, at *3 (W.D. Ky. Apr. 28, 2008), *aff'd*, 393 F. App'x 348 (6th Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1479 (2011).

Additionally, the risk that a detainee will obtain and secrete contraband is heightened by the nature of confinement. For instance, petitioner's *amicus* correctly recognizes: "Even detainees charged with minor offenses may become enmeshed in smuggling schemes as a result of interactions with other prisoners once inside the facility." ABA Br. 16. Given the violence endemic to many jails, an individual who may not have been predisposed to carry, let alone secrete, a weapon prior to arrest may obtain one for self-defense at the transferor facility and secrete it for transfer. Similarly, because drug addiction is prevalent, individuals may obtain and secrete drugs for personal use after days spent in one jail before transfer to another. Detainees also may obtain and secrete contraband because prohibited items can be used to barter for protection or other favors from fellow inmates. See, *e.g.*, Todd R. Clear et al., *American Corrections* 294-95 (9th ed. 2011); Joycelyn M. Pollock, *The Social World of the Prisoner in Prisons: Today and Tomorrow* 218, 237 (Joycelyn M. Pollock ed., 1997). For all these reasons, "the risk of contraband

traveling from one prison to another is real, and presents a significant threat to prison security." *Watsy* v. *Ames*, 842 F.2d 334 (6th Cir. 1988) (table), *available at* 1988 WL 24978, at *4 n.1 (upholding policy that subjected transferees to "'visual inspection of the entrance to the vagina and the rectal cavity'").

Accordingly, strip-searches and visual body-cavity searches of transferees are both reasonably related to legitimate penological objectives and reasonable under the circumstances. See *Turner*, 482 U.S. at 89-91; *Wolfish*, 441 U.S. at 559. Indeed, two circuits upon which petitioner relies (at 33 n.12) for the proposition that strip-searches of all new arrestees violate the Fourth Amendment hold that it is constitutional to conduct strip- and visual body-cavity searches of all transferees. See *Jackson*, 393 F. App'x at 355; *Peckham* v. *Wis. Dep't of Corr.*, 141 F.3d 694, 695 (7th Cir. 1998); *Watsy*, 1988 WL 24978, at *4 n.1.

The Ninth Circuit held similar searches were constitutional even before its en banc decision in *Bull*. *Nunez* v. *Duncan*, 591 F.3d 1217, 1227-28 (9th Cir. 2010) (visual body-cavity searches upon inmates' return from work detail); *Johannes*, 270 F. App'x at 606 (visual body-cavity searches after transfer to jail from hospital and courthouse). So too have the First Circuit (per then-Judge Breyer) and Southern District of New York (per then-Judge Sotomayor). *Arruda*, 710 F.2d at 887-88 (upholding visual cavity searches when inmates return from libraries, infirmaries, or worksites, even those located on correctional facility grounds); *Shabazz* v. *Pico*, 994 F. Supp. 460, 473 (S.D.N.Y. 1998) (upholding policy requiring visual body-cavity searches before inmates' transfer to other facilities), *aff'd*, 205 F.3d 1324 (2d Cir. 2000) (per curiam) (table).

Consistent with these decisions, BOP suggests that transfer alone provides a legitimate basis for such searches. "[A] visual inspection of all body surfaces and body cavities" is appropriate when an inmate is "leaving the institution" or "re-ent[ering] into an institution." 28 C.F.R. § 552.11(c). BOP guidance commands: "A thorough visual search shall be conducted by R&D staff on the inmate and his/her clothing prior to relinquishing custody of the inmate." BOP, Program Statement 5800.12, § 312. "Staff must exercise *extreme caution when processing inmates for transfer* ...." *Id.* (emphasis added); see *id.* § 305.

Because ECCF allegedly strip-searched and visually searched petitioner's body cavities only after he had been transferred from BCJ, the judgment for Essex should be affirmed irrespective of how this Court resolves the other issues presented.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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REPLY BRIEF

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

It is settled that the validity of a search under the Fourth Amendment depends on two elements: a court balances (i) the individual's reasonable expectation of privacy against (ii) the governmental interest furthered by the intrusion. In this case, the opening briefs of petitioner and his *amici* established that forcibly stripping an individual of all his clothes and inspecting the most private parts of his body is an extraordinary, almost unparalleled, intrusion into personal privacy and dignity. On the other side of the balance, while the security of correctional facilities is an important interest, decades of experience establish that it is advanced only trivially by strip searching minor offenders like petitioner who are not suspected of carrying contraband. In stark contrast to a planned jail visit (as in *Bell v. Wolfish*, 441 U.S. 520 (1979)), an unexpected arrest does not raise the substantial prospect of – or the need to deter – purposeful smuggling.

Respondents' justification for this search is instead the prospect that the police will by happenstance conduct an arrest for a minor offense of an individual who has no prior history of narcotics or weapons offenses but who is secretly carrying drugs taped to his genitals or shoved into his anal cavity. That scenario may happen, but its rarity is uncontestable. The overwhelming majority of ordinary Americans who might be arrested for some trivial offense like speeding – at least 99.99% – are not traveling about in such a bizarre fashion.

Respondents nonetheless contend that by strip searching the private parts of every single arrestee

they will advance a governmental interest in preventing the entry of drugs into prisons. Literally, that is true, in the attenuated sense that the jail will eventually chance upon the .01% outlier. But the Fourth Amendment does not ignore the tremendous cost imposed upon the 99.99% of other arrestees such as petitioner. Jails have the unquestioned authority not only to use pat down searches and metal detectors on all arrestees, but to strip search any person for whom reasonable suspicion arises, including from the circumstances of the present arrest or his prior criminal history. The wildly hypothetical prospect that an arrestee for whom no such suspicion exists might be the one out of every five, ten, or twenty *thousand* arrestees who is carrying drugs in this manner does not remotely justify the government subjecting every single person to the unique, dehumanizing degradation of a strip search. The discovery of contraband in these circumstances is such an astonishingly uncommon event – and the other well-known sources of contraband are so numerous – that the practice as a whole exacts too great a cost to the treasured Fourth Amendment right of privacy.

Given that the invasion of personal privacy is so grossly disproportionate to the governmental interest advanced, respondents can prevail only if this Court holds that the right of personal privacy and dignity enshrined in the Constitution does not apply with any force from the moment that an individual who is arrested for an offense like failing to pay a fine crosses the threshold of a correctional facility. Under any form of genuine constitutional scrutiny, this search violates the Fourth Amendment. Having only

recently reaffirmed that even convicted "[p]risoners retain the essence of human dignity inherent in all persons," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), this Court should hold that suspicionless strip searches of those charged with minor offenses violate the Constitution.

I. Strip Searches Of Minor Offenders Constitute A Grave Intrusion On Individual Privacy And Dignity.

Respondents essentially ignore half this case: the privacy interests upon which their strip search policies intrude so dramatically. The opening briefs of petitioner and his *amici* demonstrated that strip searches invade a specially protected sphere of personal privacy with consequences that are psychologically devastating. In recently confronting a similar but far less intrusive search, this Court concluded that the "meaning" of the practice, combined with "the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford United Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (holding that search of student's undergarments violated Fourth Amendment). Federal judges with long experience in assessing the reasonableness of varied search practices have for decades called out strip searches of persons arrested for minor offenses as especially "dehumanizing," "demeaning," and "terrifying." Pet. Br. 22 & n.9 (collecting authorities).

Importantly, the search itself cannot be separated from the broader context in which it occurs. This case involves ordinary Americans, not

hardened criminals. The individuals subject to this practice – who are arrested for non-criminal offenses like failing to wear a seatbelt, not yielding at an intersection, or not paying a fine – are often teachers, salesmen, housewives, and the like who have no comparable experience with the criminal justice system. The palpable fear and humiliation of the arrest are compounded when immediately followed by the devastation of being treated as essentially less than human as they are forcibly stripped naked and their bodies, including their most deeply private parts, are inspected. This can happen to any one of us.

Petitioner's *amici* documented – without contradiction by respondents – the still more crushing effects of this practice on vulnerable populations, including the victims of sexual assaults. *See generally* Br. of Domestic Violence Legal Empowerment and Appeals Project *et al.*; Br. of Sister Bernie Galvin *et al.* This appears to be the first form of search confronted by this Court that is so grave that it has caused innocent individuals not merely to experience significant, long-term psychological harm, but to kill themselves. Pet. Br. 24.

This case perfectly illustrates the weighty privacy and dignity interests at stake. Petitioner was wrongly arrested for civil contempt for failure to satisfy a fine. He was subjected to a pat down search and metal detector, both of which are regarded in every other context (including airports and entry to this Court) as sufficient to locate contraband, and neither of which triggered any suspicion. His entire criminal history consisted of a single instance of

driving away from a traffic stop, resulting in a guilty plea of "hinder[ing] prosecution." J.A. 68a, 89a.[1] There is thus no dispute that when respondents booked petitioner into their facilities, they had no reason to suspect – not the slightest inkling – that he might be carrying contraband, much less that he was doing so in his undergarments or body cavities. Yet respondents nonetheless twice subjected petitioner to the extraordinary degradation of ordering him under close observation to stand naked, lift his genitals, and expose his anus – and in the case of Essex County to do so before multiple other people. Under any regime that requires any form of suspicion, these searches were brazenly unconstitutional.

Respondents make only one passing effort to undercut the significance of this privacy interest. They note (Essex Br. 21) that inmates are observed by officers while naked in showers. But the two circumstances are not analogous, because the arrestee's interest is not merely in wearing clothing. Instead, during a strip search, an officer scrutinizes the individual's genitals and breasts from an arm's

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[1] Respondents do not contend that this prior offense or the circumstances in which it occurred (when he left a traffic stop and drove home without the officer's permission) gave rise to suspicion justifying the search. The Solicitor General's repeated invocation of the fact that petitioner had been "charged" with "possession of a deadly weapon" (Br. 28; *see also id.* 2 n.1) – omitting both the facts of the underlying offense and the charge to which he actually pleaded guilty – is therefore surprising and disappointingly misleading. The so-called "deadly weapon" was the car he drove away; that is no doubt why the "charge" was never pursued.

length away, a uniquely degrading intrusion into personal privacy and dignity. In a shower, by contrast, the arrestee is merely observed at a distance in essentially the same fashion that he is overseen in all other areas of the facility. *Cf. Safford*, 129 S.Ct. at 2642 (strip search violated the Fourth Amendment, notwithstanding that students may undress in the presence of others for gym class).

Further, each intrusion on privacy must be evaluated in the light of the particular governmental interest it advances. Respondents correctly note that showers must be monitored to protect inmates from sexual assault. *See* Essex Br. 21. That specific interest justifies that particular practice, but it is not implicated by the strip searches at issue in this case. Respondents do not contend otherwise.

II. Respondents' Argument That Suspicionless Strip Searches Of Minor Offenders Are Subject To Little Or No Fourth Amendment Scrutiny Lacks Merit.

a. Respondents principally contend (*e.g.*, Essex Br. 1, 29; Burlington Br. 12, 23–25) that this Court should uphold suspicionless strip searches of minor offenders under the Fourth Amendment because the judiciary must defer to the judgments of correctional officials. Preliminarily, if respondents' sweeping invocation of "deference" were accepted, no prisoner would ever prevail in a constitutional challenge to even the most outrageous prison policy. By definition, every such claim challenges the facility's judgment. But "deference" is not "abdication" and neither the Constitution generally nor the Fourth Amendment specifically enacts the tautology that

every prison policy is *ipso facto* reasonable. Correctional officials have vitally important jobs, but they are not judges and they ordinarily do not undertake to balance their efforts to advance the institution's interests in security against inmates' and arrestees' interest in personal privacy and bodily integrity. That is instead the sworn responsibility of the courts.

Thus, even accepting that respondents are correct that strip searching every single arrestee no matter what the circumstances incidentally improves their ability to intercept the introduction of contraband (*see supra* at 1-2), that fact does not answer the question presented by this case. Reducing the Fourth Amendment inquiry to whether a search assists in jail security would have startling implications. Jails could go still much further than requiring strip searches and adopt astonishing measures that are even more "effective," precisely because they are more intrusive. They could conduct a physical body cavity search of every arrestee and every employee, every day; they equally could require every inmate to remain constantly naked, including in public visitor rooms. Respondents' interpretation of the Fourth Amendment would deprive the courts of authority to find that these extreme practices violate the Fourth Amendment, given correctional officials' accurate judgment that both would even more effectively improve their effort to limit contraband.

That is not the law. This Court's Fourth Amendment precedents do reflect significant respect for the judgments of corrections officials in the assessment whether a given search will aid the institution's security. But they equally reject

respondents' sweeping attempt (Burlington Br. Part I; Essex Br. Part I) to eject the judiciary from assessing the reasonableness of their policies on the theory that the Fourth Amendment right to privacy never constrains the policies of jails and prisons. As the Solicitor General admits (at 7), this Court's decisions provide that even in prisons, "[w]hether a search is reasonable depends on a *balance* of the individual's privacy interests and the government's justification for the search" (emphasis added). *See Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (Fourth Amendment's application in jails and prisons "as in other Fourth Amendment contexts" considers whether "a 'justifiable' expectation of privacy is at stake"); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (Fourth Amendment inquiry in prison context considers "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted"). The two cases that respondents cite in support of their contrary argument do not involve searches of arrestees or otherwise shed light on the question presented by this case. *See Samson v. California*, 547 U.S. 843 (2006) (assessing searches imposed as condition of parole under traditional "reasonableness" inquiry); *Lanza v. New York*, 370 U.S. 139 (1962) (declining to decide constitutionality of intercepting jailhouse communication when communication was not introduced in prosecution of defendant).

b. If prison officials' invocation of "deference" is ever going to ring hollow – and if the judiciary has any genuine role to play in enforcing the Fourth Amendment's requirement of reasonableness – this is that case. The expert judgment of the correctional

community is that searches such as these are unnecessary and unreasonable. The widely respected comprehensive standards of the American Correctional Association – which is composed of correctional officials – thus provide that "[a] strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." Am. Corrs. Ass'n, *Core Jail Standards* § 1-CORE-2C-02; *see also* Am. Corrs. Ass'n, *Performance-Based Standards for Adult Local Detention Facilities* § 4-ALDF-2C-03 (4th ed. 2004). *See generally* Pet. Br. 15.

Most jails and prisons share that judgment, and respondents provide no reason that this Court should reject it. Many states (including New Jersey) apply it by statute. *See* Pet. Br. 15–16 & n.6.[2] The principal federal agencies that house detainees *all* forbid strip searches in these circumstances, and the Solicitor General's statement that "petitioner's approach finds no support in federal policy or practice" (Br. 9) is itself not just insupportable but inexplicable. The United States admits – although not until page 30 of its *amicus* brief, and then almost in passing – that the policies of both the Bureau of Prisons and U.S. Marshal's Service forbid the search in this case. *See also* Pet. Br. 14. The Bureaus of Immigration and Customs Enforcement (which of course houses large

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[2] It is noteworthy that, although states have significant incentives to advocate a narrower reading of the Fourth Amendment, only twelve have joined in an *amicus* brief in this case supporting respondents.

numbers of immigration detainees) and Indian Affairs adopt the American Correctional Association Standards and apply the same rule (*see* Pet. Br. 14–15), policies that go entirely unacknowledged by the government. Every federal institution would have forbidden this search.[3]

No less important, respondents' own practices refute their argument that this Court should defer to their supposed judgment that strip searching every arrestee is necessary to detect contraband. Both Essex and Burlington elide the important fact that depending on the circumstances they search arrestees in two materially different ways that have two different purposes. Both involve stripping the arrestee naked under the direct observation of a government official, triggering significant Fourth Amendment scrutiny. But in cases like this one – a minor offender who is not suspected of carrying contraband – respondents subject the arrestee to what they term a "visual observation."

The visual observation is conducted in a manner calculated to detect "scars, marks, and tattoos" (J.A.

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[3] The United States argues (at 30) that BOP's prohibition on suspicionless strip searches of persons jailed for civil contempt is irrelevant because BOP also requires that these arrestees be kept separate from the general jail population. But this attempt to suggest that BOP is concerned about smuggling by minor offenders is belied by the policies of every other division of the Department of Justice forbidding the searches undertaken in this case *without* requiring that minor offenders be separately housed. Further, jails are free to follow the same practice of requiring segregated housing, and many do. *See* Pet. Br. 33–34; *see also* J.A. 134a, 205a, 210a (Burlington Jail).

11a), *not* – contrary to the incorrect representation of the United States (at 3) – "contraband." The arrestee must remove his clothes, turn around, and lift his genitals. But the officer importantly is not directed to study the arrestee's body in detail, or to conduct any examination of body cavities, in a manner intended to locate contraband. Burlington thus explicitly *bans* any strip search for contraband absent "reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found." Pet. App. 126a; *see also* J.A. 218a. As Burlington itself highlights in its brief to this Court (at 35 (quoting J.A. 390a)), "the standard form [documenting the search] itself stated that 'visual observation was made for recent injuries.'" *Accord id.* at 16 ("The practice that is at issue here – visually observing a new detainee during kwelling [*i.e.*, shampooing for lice] – was the only practice that was followed during all intakes.").

Essex, by contrast, did conduct such a detailed strip search of petitioner (in front of several other inmates) intended to locate contraband. *See* Pet. Br. 6. But soon after the events in this case, Essex changed its practices to adopt the same rule as Burlington. Essex has thus made the express judgment that in cases such as this one it is appropriate to observe arrestees only for "tattoos," "body vermin and disease," and sores, wounds, and injuries. *See* J.A. 64a–65a.

By contrast, respondents both have a distinct search regime, which they apply only in cases of reasonable suspicion, that involves the "systematic" examination of the arrestee's naked body to identify contraband, including inspecting body cavities. J.A.

11a (Burlington), 64a–65a (Essex). The Warden of the Burlington Jail thus testified in his sworn deposition that the facility conducts a detailed strip search for "contraband" such as "weapons, knives, drugs, et cetera" only when the "person is coming in with indictable charges. Drug charges. Or he's a known drug addict." J.A. 118a.

Respondents offer no way to bridge the wide gap between their actual practice of not searching individuals such as petitioner for contraband in the absence of reasonable suspicion and their rhetoric in this Court that a uniform suspicionless strip search policy is essential to interdict drugs. In determining whether to "defer" to correctional practices, actions speak louder than words. Given that respondents do not themselves think it is necessary to strip search all arrestees in a manner calculated to identify contraband, their position is actually that this Court should *reject* not only the expert judgment of the correctional community but also the practices they have themselves adopted for their own institutions.

c. Respondents' claim that the rule proposed by petitioner is inadministrable is similarly empty rhetoric that is contradicted by established practice and by their own actions. Burlington thus asserts (at 46) that an "individualized suspicion" standard "injects subjectivity into a process that should be generally applied." But of course respondents' own proposed rule – under which officers need not strip search every arrestee but instead have the power to strip search any individual of their choosing without regard to individualized suspicion – authorizes far more subjectivity.

In any event, the reasonable suspicion standard has long been applied in the great majority of the country without difficulty. It was in fact virtually the uniform rule – applied by eight consecutive decisions of the federal courts of appeals and also adopted by approximately eighteen states – until the Eleventh Circuit's decision in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). *See* Pet. Br. 13 n.4, 15–16 n.6. The same standard is applied by the U.S. Marshals Service and the Bureau of Immigration and Customs Enforcement (for all detainees), as well as the U.S. Bureau of Prisons for individuals such as petitioner who have been arrested for civil contempt. *See id.* 14–15. Just as telling for purposes of this case, as discussed above, respondents *themselves* both apply a reasonable suspicion standard in determining whether to conduct a strip search for contraband as opposed to a "visual observation" of the naked arrestee. Respondents neither claim that they have experienced any difficulty applying that rule nor identify any evidence of problems in the many other jurisdictions that apply the same standard.

Respondents next complain that the nature of the individual's offense is not a reliable indicator of the likelihood that he will be carrying contraband, or that such a standard would at least be "extremely burdensome" to apply. Essex Br. 35. This case does not call on this Court to elaborate in detail the circumstances (including particular offenses) that will give rise to "reasonable suspicion" justifying a strip search. But it is worth noting that, once again, this line is widely drawn and applied, including by longstanding precedent, respondents, and the federal government. As the Solicitor General admits (at 27–

28), "the Burlington jail's policy distinguishes between individuals arrested for indictable and non-indictable offenses, see Pet. App. 53a, and federal policy distinguishes between persons arrested for felonies and those arrested for misdemeanors or civil contempt offenses." New Jersey law also requires the classification of inmates. *See* Pet. Br. 34.

Those precise line-drawing decisions are the types of correctional judgments to which courts may reasonably defer, in contrast to respondents' broader argument that the judiciary should abdicate any review of the Fourth Amendment reasonableness of a categorical policy of strip searching every arrestee without regard to the circumstances. Although the nature of the offense has elements of over- and under-inclusiveness, it sensibly and reasonably narrows the categories of individuals who might be carrying contraband into the facility.[4]

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[4] The assertion by the United States that the "district court had considerable difficulty determining whether petitioner should be classified as an indictable or non-indictable offender" (Br. 28) is a significant overstatement. Although it found the question "not absolutely clear," the district court concluded: "there is no evidence in the record suggesting that Florence was charged with the variety of civil contempt that requires indictment . . . . Likewise, there is nothing to suggest he would have been subject to a sentence in excess of six months imprisonment or a $1,000 fine had he been found guilty of contempt." J.A. 28a.

III. The Interests Asserted By Respondents In Support Of Strip Searching All Arrestees Are Insubstantial.

a. As discussed above, respondents conduct a naked "visual observation" of all arrestees for the specific purpose of identifying scars, marks (such as tattoos), and disease. In this Court, respondents do not seriously argue that those interests justify such a dramatic intrusion on personal privacy – *i.e.*, they do not defend the policies on their own terms. Burlington notes (at 34) that it "discussed" those interests in the district court and that both respondents submitted isolated exhibits suggesting that their facilities include gang members (*id.* 36–37 n.20). But it is undisputed that neither respondent introduced any evidence in the district court that these specific searches were either necessary or effective to advance interests related to health or gang violence.

Respondents also make no effort to answer the contrary showing by petitioner's *amici*. Experts have explained that only medical professionals are qualified to assess an inmate's health and whether he carries a disease such as MRSA. *See generally* Br. of Med. Soc'y of N.J. et al. That is no doubt why jails require a medical examination after the inmate's intake. In addition, experts in gang behavior have refuted the suggestion that gang members hide identifying tattoos beneath their undergarments. *See generally* Br. of Academics on Gang Behavior.

b. Respondents instead argue that suspicionless strip searches are required to interdict contraband. That argument muddles several distinct points. They correctly note that drugs are a grave problem in

correctional facilities. But that says little about the question presented by this case, because of the other tools available to search arrestees and because it is well established that there are numerous other more significant sources of contraband such as smuggling by guards. *See, e.g.*, Pet. Br. 31 n.10.

With somewhat greater specificity, respondents note that arrestees have occasionally been found with contraband. But again, that says very little about the circumstances of this case, in which an individual with no criminal history involving drugs or weapons was arrested for a non-criminal offense – the failure to pay a fine. Respondents offer no reason to believe that these arrestees are a material source of contraband, or that other means are ineffective to locate what contraband exists.

When *that* more relevant question is asked, the evidence is overwhelming that strip searching such individuals plays no material role in limiting the introduction of contraband to jails. The expert standards of the American Correctional Association conclude that sufficient protection against contraband is provided by other tools such as pat down searches, requiring arrestees to strip to their undergarments, and the use of metal detectors and BOSS chairs. Further, the reasonable suspicion standard has been applied throughout the great majority of the country for decades. Respondents point to no evidence suggesting that facilities enforcing that rule experience greater levels of contraband. A report commissioned by the U.S. Department of Justice concluded that the "passionate[]" assertions of jail officials that suspicionless strip searches were necessary to protect

their institution proved incorrect in practice and in fact "exaggerate[d] a security threat." WILLIAM C. COLLINS, NAT'L INST. OF CORRS., U.S. DEP'T OF JUSTICE, JAILS AND THE CONSTITUTION: AN OVERVIEW 28–29 (2d ed. 2007). The most detailed assessment of the issue was undertaken by the district court in *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 70 (S.D.N.Y. 2003), which was able to identify only a single instance among 23,000 arrests in which contraband would not have been discovered under a reasonable suspicion standard.

The record in *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), is not to the contrary. The finding of the district court in *Bull* that jail officials had found a substantial amount of contraband generally "in and on arrestees' bodies" over the course of six years, *id.* at 969, once again does not address the more specific question whether suspicionless strip searches of minor offenders materially limit the introduction of contraband. Much of the contraband in *Bull* was located in searches of persons in so-called "safety cells" rather than upon the inmate's admission to the jail, *see Bull v. City & Cnty. of San Francisco*, No. C 03-01840-CRB, 2006 WL 449148, at *2 (N.D. Cal. Feb. 23, 2006), or was found on individuals pursuant to the "reasonable suspicion" standard endorsed by petitioner, which the jail adopted in 2004, *see* Def.'s Opp'n to Pl.'s Mot. Summ. J. at 4. In many other instances, the contraband was found in locations that did not require a strip search (such as the individual's mouth, ear, jacket, or waistband), or through a strip search that would have been authorized as a result of the crime of arrest

(involving drugs, weapons, or violence) or the defendant's criminal history. *See* Brin Decl., *Bull v. City & Cnty. of S.F.*, 2006 WL 449148 (No. C 03-01840-CRB) (N.D. Cal. Feb. 23, 2006).

In this case, the district court found that respondents had submitted no evidence of a smuggling problem in their facilities. Pet. App. 87a. Respondents argue to the contrary (*e.g.*, Essex Br. 34, 37–38, 51) that they submitted a report by George Camp, who last worked in a correctional facility in 1977. But it is not surprising that the court found that report unpersuasive. It is devoid of any actual evidence to support its assertions, as Camp failed to identify an example anywhere in the United States of an arrestee charged with a minor offense attempting to smuggle contraband into a jail. It would in any event be hard to identify a more discredited expert in the field, so much so that three separate federal courts have gone to the trouble of writing opinions that call attention to Mr. Camp's unreliability. The court in *Marria v. Broadus* excluded Camp's report after finding it "misleading," "thoroughly unhelpful to the trier of fact," and "founded on biased and therefore unreliable evidence." 200 F. Supp. 2d 280, 291 (S.D.N.Y. 2002). The court in *Goff v. Harper* found Camp's calculations "less than accurate" and "somewhat deceptive." 1997 WL 34715292, at *10 (S.D. Iowa June 5, 1997). And the court in *Benjamin v. Malcolm* found some of Camp's conclusions "questionable" and "discounted" others because he had made potentially faulty assumptions. 564 F. Supp. 668, 680–81 (S.D.N.Y. 1983).

Essex County (at 3, 50) and the Solicitor General (at 19) also invoke a memorandum written by an

assistant warden of the Essex County Correctional Facility to Essex County's attorney. *See* J.A. 70a–71a. But again, it is plain why the court gave that document no substantial weight. Not only is it completely self-serving (having been prepared for the obvious purpose of defending this lawsuit), but the memo asserts only that over an entire year Essex initiated "fourteen investigations of inmates being processed into our facility with contraband being found on their persons . . . ." *Id.* 70a. So far as the memorandum reveals – and the author had every reason to put forward any examples that would help respondents' case – Essex could not identify *any* instances (including from the records of the fourteen cited examples) in which it found contraband on a person who would not have been subject to search under a reasonable suspicion standard, or indeed that would not have been discovered using procedures (such as pat downs) that are less intrusive than a strip search.

c. Essex makes two further arguments. It contends (at 52) that the search of petitioner was justified because he was transferred from another facility. But the mere fact that a misdemeanor offender was housed in a jail is not a sufficient basis to justify an intrusive strip search. If it were, then every arrestee could presumably be strip searched every day. But in any event, this Court need not resolve this argument, which Essex did not raise in the court of appeals, and which can be decided on remand to the extent it has been properly preserved. That is particularly true because disputes remain regarding petitioner's claim that he was

unreasonably searched in front of multiple other inmates.

Essex also (at 4) makes the new assertion that, because it has chosen to place arrestees in "a waiting room or holding cell in the pre-booking area that can hold dozens of other" arrestees, a misdemeanor offender could be given contraband to conceal. Notably, it cites no evidence of this scenario ever occurring. But in any event, the government cannot justify a search by forcibly placing individuals in the very circumstances that are supposed to give rise to suspicion. The police cannot arrest someone, place him in a room full of drug offenders, and then use that fact to strip search him.

Essex can also solve this dilemma of its own making. Like hundreds of other institutions, it can segregate groups of arrestees, supervise them while together, or complete the intake process (including strip searches of persons for whom there is reasonable suspicion) before placing them in a common room.

IV. Respondents' Remaining Arguments For Applying Lessened Fourth Amendment Scrutiny Lack Merit.

a. The court of appeals erred in concluding that it was compelled to uphold suspicionless strip searches of all arrestees by this Court's decision in *Bell v. Wolfish*. By its terms, *Bell* requires a "balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. The "need" in *Bell* was far greater than in this case. In *Bell*, inmates arranged loosely supervised contact visits that the

government represented were a unique opportunity for smuggling contraband. *See id.* at 559–60. The prospect of a strip search accordingly played a substantial deterrent role. *See id.* at 559. This case, by contrast, involves an unexpected arrest and therefore no comparable risk of purposeful smuggling.[5]

So too, on the other side of the Fourth Amendment balance, *Bell* involved a lesser "invasion of personal rights." The inmates in *Bell* elected to submit themselves to a strip search in exchange for the opportunity to engage in contact visits without close supervision. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (totality of circumstances may

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[5] The Solicitor General asserts to the contrary (at 25) that "[i]ndividuals arrested for non-violent, non-drug offenses often have attempted to smuggle contraband into prisons and jails." But the weak basis for that statement is striking. The United States operates by far the largest correctional system in the nation – among the largest in the world. The Solicitor General in turn generally does not hesitate to make assertions based on data supplied by various federal agencies – assertions that could be tested through a request under the Freedom of Information Act. With months to gather that information, the government makes no representations to this Court that the actual data from the federal prison system would support such a sweeping claim. The best that the Office of the Solicitor General can do is to make extensive use of Westlaw to identify seven cases reported in newspaper articles over the course of five years in the entire country (*id.* at 25 n.15), none of which describes an actual effort to smuggle materials into jail. That thin evidence does not remotely support the counterintuitive claim that individuals in petitioner's position who are arrested for misdemeanor offenses "often have" attempted to engage in smuggling.

establish consent to waiver of privacy rights). There is no comparable voluntary sacrifice of arrestees' right to privacy in this case. It is therefore not surprising that for decades in the wake of *Bell* the courts of appeals uniformly held that suspicionless strip searches of minor offenders violate the Fourth Amendment. *See* Pet. Br. 13 n.4.

b. Respondents make two other passing arguments for lessened constitutional scrutiny. Neither has merit.

In contrast to the United States' acknowledgement that the Fourth Amendment requires a balancing of individual and governmental interests, respondents make other passing arguments for lessened constitutional scrutiny. None has merit. Both respondents invoke the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). But this Court has not previously applied *Turner* to Fourth Amendment claims, much less to Fourth Amendment claims of pre-trial detainees who, in many cases, may not even have been subject to a probable cause determination by a magistrate, much less been convicted of a crime. Respondents argue that *Turner* implicitly overruled the balancing test applied in *Bell v. Wolfish*, but their only evidence for that assertion is that *Turner* cited *Wolfish*. However, respondents ignore that the citation upon which they rely was only to *Bell*'s discussion of the First Amendment, not its analysis of the prisoners' Fourth Amendment claim. *See Turner*, 482 U.S. at 87.

Likewise, respondents ignore that in the wake of *Turner*, this Court has applied traditional Fourth Amendment balancing to individuals more akin to arrestees than are the convicted prisoners to whose

rights this Court spoke in *Hudson v. Palmer*, 468 U.S. 517 (1984). *See Samson v. California*, 547 U.S. 843, 848–850 (2006) (applying traditional Fourth Amendment balancing, while taking into account parolee's convicted status, to suspicionless search of parolee's home); *Griffin v. Wisconsin*, 483 U.S. 868, 876–77 (1987) (same for probationer). Surely, the Constitution does not afford greater protection for the privacy of convicted felons who remain within the "'continuum' of state-imposed punishments," *Samson*, 547 U.S. at 850 (citation omitted), than it does for individuals simply believed by the police to have committed a minor offense and whose innocence is presumed (and often, as in this case, never rebutted through a criminal conviction).[6] Instead, the unique context of the correctional environment is appropriately taken into account by incorporating it

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[6] Even in the context of convicted inmates, the Court has not reflexively applied *Turner* to every constitutional claim. For example, in *McKune v. Lile*, 536 U.S. 24 (2002), the Court reviewed a prison rule that impinged on the Fifth Amendment right against self-incrimination of convicted prisoners. The Court recognized that "the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis," *id.* at 36, but did not therefore apply only the rational basis scrutiny of *Turner*. To the contrary, the Court held that a prison program impinging on the right against self-incrimination must both "bear a rational relation to a legitimate penological objective" – *i.e.*, satisfy *Turner* – and ensure that the "adverse consequences an inmate faces for not participating" in the program be "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *Id.* at 37-38. *See also, e.g.*, *Johnson v. California*, 543 U.S. 499, 512 (2005) (equal protection claims not subject to *Turner* analysis).

an important element of the assessment of the Fourth Amendment "reasonableness" of a challenged practice. *Hudson*, 468 U.S. at 527; *Bell*, 441 U.S. at 559–60.[7]

Next, Essex alone contends (at 39–41) that suspicionless strip searches are governed by the "special needs" doctrine. But respondent never explains the consequence of this argument, and there is none, because (as even Essex acknowledges) under the "special needs" framework a suspicionless search still violates the Fourth Amendment if it produces an "invasion of personal rights" that outweighs the "need for the particular search." Essex Br. 40 (quoting *Bell*, 441 U.S. at 559).

The mere presence of "special needs" thus does not validate an otherwise unconstitutional suspicionless search. A "search may be reasonable despite the absence of [individualized] suspicion" only when two conditions are met: first, "where the privacy interests implicated by the search are minimal," and second, "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989).

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[7] Further, whatever standard applies to claims by convicted inmates, genuine Fourth Amendment scrutiny is required with respect to the initial detention of minor offenders. Generally speaking, at the time an arrestee is admitted to jail, a judge will not have determined that the detention is proper and that the individual should be remitted to the custody of correctional officials.

Neither of those conditions is met here. First, unlike the cases Essex cites involving urine samples collected for drug tests, it is self-evident that the "privacy interest[] implicated" by compelling an arrestee to strip naked in front of prison guards is far from "minimal." Second, intake searches are nothing like the cases Essex cites with respect to the impact that an individualized suspicion requirement would have on government interests. In *Skinner*, for instance, this Court observed that it was "most impracticable" to require employers to obtain evidence that employees were impaired by drugs in the immediate and "chaotic" aftermath of a serious railroad accident. 489 U.S. at 631. Here, by contrast, experience demonstrates in federal and state institutions throughout the country that a requirement of individualized suspicion hardly jeopardizes the government's claimed interests.

c. Finally, although Essex contends that its position is supported by history, it comes nowhere near establishing a "clear practice . . . approving . . . the type of search at issue, at the time the constitutional provision was enacted." Essex Br. 16 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). Respondent thus omits the conclusions of its principal source that "the constitutionality of searching prisoners and other persons was ill-defined when the Fourth Amendment appeared. Statutes, case law, and centuries of protest literature had little to say on the subject." 3 WILLIAM J. CUDDIHY, FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 1552. And "[n]either the Amendment nor its most proximate evidence provided a sure indication of the kinds of body-

searches that Americans thought reasonable in 1789-91 or the circumstances in which they thought them so." *Id.* at 1553. *See also id.* at 1552–53 n.394 ("outrage at body-searches was common . . . . Statutes that permitted general searches rarely mentioned persons.").[8]

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[8] Essex notes (at 16) that early in the nation's history individuals were subject to an extensive search upon "arrest" (as opposed to admission to jail), a distinct circumstance that is governed by different Fourth Amendment principles. Respondent also notes (at 17) that in some early jails, inmates (as opposed to jail officials) stripped new arrivals in a "ceremony of ablution" that had nothing to do with an effort to intercept contraband and that accordingly does not inform the question presented here.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-945

In the Supreme Court of the United States

ALBERT W. FLORENCE, PETITIONER

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a policy of conducting strip searches of all incoming detainees who will be placed in the general prison or jail population is consistent with the Fourth Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment permits prison and jail officials to maintain a policy of conducting strip searches of all incoming detainees before they are placed in the general prison or jail population. The Federal Bureau of Prisons (BOP) operates 116 federal prison facilities, which, along with privately managed and contract facilities, house more than 216,000 pretrial detainees and convicted inmates. BOP policy requires all incoming pretrial detainees to be subject to visual body-cavity inspections before they may be placed in the general prison population; an inmate who is not subjected to such a search may not be placed in the general population. The United States

Marshals Service (USMS) operates cell blocks in each of the 94 federal district courthouses, as well as one in the District of Columbia Superior Court, in which it houses federal arrestees, pretrial detainees, and convicted inmates who are in transit between facilities. Although the USMS does not currently conduct visual body-cavity inspections of all arrestees upon intake, USMS policy allows such searches to be conducted in certain circumstances, including where warranted by the type and security level of the institution and its history of contraband. The United States thus has a significant interest in the Court's resolution of the question presented in this case.

STATEMENT

1. In March 2005, a New Jersey state trooper stopped a car in which petitioner was a passenger. Pet. App. 3a. A police records check revealed an outstanding warrant for petitioner's arrest. *Ibid.*; J.A. 89a-90a.[1] Petitioner told the state trooper that the warrant was invalid, but the trooper arrested him and brought him to the Burlington County jail for detention. Pet. App. 3a.

During the intake process at the Burlington County jail, officers reviewed petitioner's paperwork, inventoried his property, and fingerprinted him. J.A. 99a-108a. Petitioner then was required to remove his clothing in

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[1] The warrant stemmed from an earlier incident in which petitioner fled the police during a traffic stop, was arrested and charged with obstruction of justice and possession of a deadly weapon, pleaded guilty to hindering prosecution and obstructing the administration of law, and was sentenced to two years of probation and ordered to pay a fine. J.A. 25a-26a, 242a-244a; Burlington Br. in Opp. 3 n.1. When petitioner failed to pay the fine and then failed to appear at a hearing to enforce the fine, the warrant issued. Pet. App. 3a; J.A. 26a, 89a-90a. Petitioner paid the fine before the arrest at issue in this case. J.A. 86a-88a.

front of a corrections officer, take a shower, and put on a jail jumpsuit. J.A. 10a-13a. Burlington County policy required that all incoming detainees who would be housed in the general jail population be subject to a visual observation after they disrobed but before they showered, to allow a corrections officer to examine the detainees for contraband, gang tattoos, injuries, or evidence of disease. Pet. App. 53a-57a, 115a-117a, 125a. The officers testified that petitioner (like all incoming detainees) was subject to this visual observation. J.A. 110a-119a, 161a-166a, 195a-196a, 218a-220a, 229a-231a; see also J.A 10a-13a. Petitioner contends that he was subject to a visual body-cavity inspection, a more thorough type of search where the naked subject typically is required to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. Pet. App. 4a, 52a; J.A. 251a-252a. It is undisputed that during the search, a corrections officer sat an arm's length away from petitioner and did not touch him. Pet. App. 3a.

Petitioner was housed with the general population at the Burlington County jail, where he remained for six days. Pet. App. 3a. The Essex County sheriff's department then moved petitioner to the Essex County jail. *Ibid.* Essex County policy provided that all incoming detainees were required to submit to visual body-cavity inspections. *Id.* at 5a n.2, 140a-142a. Petitioner testified that during the intake process at the Essex County jail, he and four other men were required to enter separate shower stalls, remove their clothing, and shower while being observed by two corrections officers. *Id.* at 3a-4a; J.A. 255a-257a. After the shower, petitioner contends that he was required to open his mouth, lift up his arms, turn around so he was facing away from the officers, lift up his genitals, squat, and cough. Pet. App. 4a; J.A.

256a. Essex County officers acknowledged that petitioner was subject to a visual observation, but disputed that petitioner was subject to a visual body-cavity inspection, J.A. 271a-272a, 291a-292a, and stated that, in any event, only three detainees could be in the shower area at one time and only one officer was assigned to the shower area, J.A. 283a-288a, 302a-304a. After the shower, petitioner put on a jail jumpsuit and joined the general jail population. Pet. App. 4a; J.A. 258a.

The next day, the charges against petitioner were dismissed, and he was released from the Essex County jail. Pet. App. 4a.

2. Petitioner sued the Burlington jail, the Essex jail, and several county officials and entities under 42 U.S.C. 1983. Pet. App. 4a; C.A. App. 118-128 (amended complaint). He raised a variety of constitutional claims, including a Fourth Amendment challenge to the jails' requirement that he remove his clothing in view of corrections officers and expose his body and body cavities as part of the intake process. Pet. App. 4a; C.A. App. 121-125. Petitioner contended that such searches may not be conducted on detainees who were arrested for non-indictable offenses, *i.e.*, offenses punishable by six months or less of imprisonment under New Jersey law, absent reasonable suspicion. Pet. App. 60a.[2] The district court certified a class of individuals arrested for

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[2] New Jersey law does not classify offenses as felonies or misdemeanors. Instead, it distinguishes between "crimes"—which are offenses punishable by more than six months of imprisonment—and offenses that are punishable by six months or less of imprisonment. See N.J. Stat. Ann. §§ 2C:1-4, 2C:43-1 (West 2005); *id.* § 2C:43-6 (West Supp. 2011). For all "crimes," the defendant has a right to be charged by indictment. See N.J. Stat. Ann. § 2C:1-4(a) and (b) (West 2005); N.J. Court R. 3:7-2; *State* v. *Senno*, 398 A.2d 873, 877 (N.J. 1979); Pet. App. 53a n.3.

non-indictable offenses and held at the Burlington and Essex jails. J.A. 43a.[3]

The district court then granted summary judgment for petitioner, holding that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband [are] unconstitutional." Pet. App. 87a. Although the court acknowledged factual disputes about how intrusive the searches at the Essex and Burlington jails were, *id.* at 51a-66a, it concluded that it need not resolve those disputes because even a policy of conducting brief visual observations of unclothed detainees violates the Fourth Amendment in the absence of reasonable suspicion, *id.* at 64a-65a, 84a.

The district court recognized that in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), this Court upheld a federal detention center's policy of conducting visual body-cavity inspections of detainees after contact visits with outsiders because "the need for the particular search" outweighed "the invasion of personal rights that the search entails." Pet. App. 68a (quoting *Wolfish*, 441 U.S. at 558-559). But the district court determined that the balance of interests in this case yielded a different result. *Id.* at 84a-87a.

3. The district court certified for interlocutory appeal the question "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment." Pet. App. 46a; see *id.* at 35a-47a. The court of appeals reversed. *Id.* at 1a-32a.

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[3] Because the district court did not resolve the factual disputes about whether petitioner was subject to only a visual observation or also a visual body-cavity inspection at the jails, it certified the class only with respect to the former claim. See Pet. App. 5a n.1.

The court of appeals explained that the touchstone of the Fourth Amendment is reasonableness, a standard that requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails." Pet. App. 8a (quoting *Wolfish*, 441 U.S. at 559). The court recognized that an individual's "privacy is greatly curtailed" when he is incarcerated in a correctional facility, where "'curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives * * * [,] chief among which is internal security.'" *Ibid.* (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984)). The court acknowledged that a visual body-cavity inspection constitutes a "significant intrusion on an individual's privacy," but it also determined that the searches at issue were "similar to or less intrusive than those in" *Wolfish* and were conducted "in a similar manner and place as those in" *Wolfish*. *Id.* at 19a-20a (citation omitted).

Turning to the jails' justification for the searches, the court of appeals observed that "'[d]etention facilities are unique place[s] fraught with serious security dangers,'" Pet. App. 20a (quoting *Wolfish*, 441 U.S. at 559; second set of brackets in original), and that New Jersey jails, "like most correctional facilities, face serious problems caused by the presence of gangs," *ibid.* Noting that the "[p]revention of the entry of illegal weapons and drugs is vital to the protection of inmates and prison personnel alike," the court concluded that the jails' interest in preventing smuggling during intake is "as strong as the interest in preventing smuggling after the contact visits at issue in" *Wolfish*. *Id.* at 21a.

The court of appeals disagreed with petitioner's assertion that arrestees are unlikely to be smuggling con-

traband, explaining that "it is not always the case" that arrests are unanticipated and that detainees may "induce or recruit others to subject themselves to arrest * * * to smuggle weapons or other contraband into the facility," especially if certain classes of arrestees may not be strip-searched. Pet. App. 23a. It also rejected petitioner's contention that "jails have little interest in strip searching arrestees charged with non-indictable offenses," explaining that *Wolfish* "explicitly rejected any distinction in security risk based on the reason for the detention." *Id.* at 21a. Finally, the court rejected the suggestion that prison administrators could address smuggling through alternative means. The court emphasized that corrections officials must be afforded great deference in ensuring institutional security. *Id.* at 26a. It further noted that, in any event, the proposed alternatives, such as metal detectors, would not be as effective as the challenged searches in uncovering weapons, drugs, and other contraband. *Id.* at 27a-28a.[4]

Judge Pollak dissented. Pet. App. 29a-32a.

SUMMARY OF ARGUMENT

The Fourth Amendment permits prison and jail officials to conduct visual body-cavity inspections of all detainees who will join the general inmate population.

A. The Fourth Amendment protects individuals against unreasonable searches and seizures. Whether a search is reasonable depends on a balance of the individual's privacy interests and the government's justification for the search. In the prison and jail context, privacy rights are necessarily diminished, and corrections offi-

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[4] Neither the district court nor the court of appeals addressed the validity of petitioner's arrest or the lawfulness of his detention. Those issues therefore are not before this Court. See Pet. App. 22a n.7.

cials are afforded wide latitude to ensure the safety and security of their facilities.

Consistent with those principles, this Court has upheld a federal detention facility's practice of conducting suspicionless visual body-cavity inspections of all inmates after contact visits with outsiders. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The Court explained that, without underestimating the degree to which the searches invaded inmates' privacy interests, the institution's compelling interest in preventing smuggling of weapons, drugs, and other contraband outweighed privacy concerns.

B. The same security objectives that justified the searches upheld in *Wolfish* justify the searches at issue in this case. As in *Wolfish*, the searches at issue consist of visual body-cavity inspections, conducted by trained corrections professionals, and respond to a real and substantial threat that contraband will be smuggled into detention facilities. As in *Wolfish*, the searches are grounded in the need to protect the safety of inmates and officers and maintain institutional security. Petitioner articulates no persuasive reason to believe that an arrestee's initial admission to the general prison or jail population poses a significantly lesser risk than the contact visits at issue in *Wolfish*. On the contrary, there is ample evidence to support the common-sense conclusion that arrestees will avail themselves of any opportunities to smuggle contraband into corrections facilities.

Although petitioner suggests a number of alternative means of addressing the problem, the existence of alternatives does not render the searches unreasonable. In any event, none of petitioner's proposed alternatives has proved as effective. To the extent that difficult judgment calls must be made about how to address the

smuggling problem, corrections officials with the necessary expertise should make those judgments.

C. Petitioner contends that visual body-cavity inspections should not be allowed at intake for "minor" offenders in the absence of individualized reasonable suspicion. Petitioner does not identify which offenses constitute "minor" offenses, and it would be wrong to assume that certain classes of offenders do not pose a smuggling threat. Moreover, exempting one class of offenders from visual body-cavity inspections would encourage others to enlist detainees in that class to smuggle contraband. It is no answer to suggest that the circumstances of the arrest may give rise to reasonable suspicion; jail personnel conducting intake often will lack sufficient information to evaluate the likelihood that the detainee may be carrying weapons or other contraband. Finally, petitioner's approach finds no support in federal policy or practice: Federal Bureau of Prisons policy requires that all incoming detainees undergo visual body-cavity searches before they may be placed in the general prison population, and United States Marshals Service policy authorizes those searches on an institution-wide basis when necessary to address smuggling concerns.

ARGUMENT

PRISON AND JAIL OFFICIALS NEED NOT HAVE INDIVIDUALIZED SUSPICION TO JUSTIFY STRIP SEARCHES OF INCOMING DETAINEES WHO WILL BE PLACED IN THE GENERAL PRISON OR JAIL POPULATION

Prisons and jails are "unique place[s] fraught with serious security dangers," where the smuggling of weapons, drugs, and other contraband poses a serious threat to inmate and officer safety and institutional security.

Bell v. *Wolfish*, 441 U.S. 520, 559 (1979). Based on that threat, the Court in *Wolfish* upheld a practice of conducting visual body-cavity inspections of all detainees in a federal short-term detention facility who had contact visits with outsiders in order to discover and deter the smuggling of weapons, drugs, and other contraband.

This case concerns the constitutionality of similar searches of detainees upon their initial admission to the general population of a prison or jail. As the court of appeals correctly held, the searches at issue in this case are no more intrusive, and no less justified, than the searches at issue in *Wolfish*. In the face of ongoing security threats in prisons and jails, the Fourth Amendment does not impose an inflexible requirement of individualized suspicion. It instead affords corrections officials appropriate latitude to implement those policies and practices they deem necessary to preserve institutional security.

A. The Fourth Amendment Permits Corrections Officials To Conduct Reasonable Searches To Protect Inmates And Officers And To Maintain Institutional Security

1. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. As this Court often has explained, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006); see also, *e.g.*, *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011).

Whether a search is reasonable depends on a weighing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott* v. *Harris*, 550 U.S. 372, 383 (2007) (ci-

tation omitted); see, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). Not every search must be justified by individualized suspicion. While "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Samson* v. *California*, 547 U.S. 843, 855 n.4 (2006) (internal quotation marks omitted).

2. Incarceration necessarily imposes limits on inmates' constitutional rights, including Fourth Amendment rights. While "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner* v. *Safley*, 482 U.S. 78, 84 (1987), this Court has recognized that "imprisonment carries with it the circumscription or loss of many significant rights," *Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984). That "principle applies equally to pretrial detainees and convicted prisoners." *Wolfish*, 441 U.S. at 546. A detainee retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). Internal security is "chief" among those objectives. *Hudson*, 468 U.S. at 424. This Court has thus recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Wolfish*, 441 U.S. at 546.

In the Fourth Amendment context, the Court has made clear that "prisoners have no legitimate expectation of privacy" as against certain practices, such as random searches of their cells. *Hudson*, 468 U.S. at 530; see *id.* at 526-527 (explaining that "[t]he recognition of

privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions," including ensuring the safety of personnel, visitors, and inmates, and preventing the introduction of drugs, weapons, and other contraband into the prison). But the Court has also "assum[ed] * * * that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility." *Wolfish*, 441 U.S. at 558. An assessment of the reasonableness of inmate searches therefore must account for the unique nature of incarceration and the legitimate security needs of correctional facilities.

3. Applying those principles in *Bell* v. *Wolfish*, *supra*, this Court upheld a federal detention center's policy of conducting visual body-cavity inspections of all detainees after contact visits with persons from outside the facility. 441 U.S. at 558. The Metropolitan Correctional Center (MCC) housed a wide variety of detainees, including pretrial detainees, convicted inmates awaiting sentencing or transportation to prison, witnesses in protective custody, and individuals incarcerated for contempt. *Id.* at 524. MCC policy dictated that all detainees undergo visual body-cavity inspections after contact visits. *Id.* at 558. The policy's purpose was to "discover [and] also to deter the smuggling of weapons, drugs, and other contraband into the institution." *Ibid.* The policy did not require corrections officials to have any individualized suspicion before conducting the searches. *Id.* at 558, 560.[6]

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[6] That the MCC policy did not require any level of individualized suspicion was also made clear by the district court's opinion, see *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 146-148 (S.D.N.Y. 1977), aff'd in part and rev'd in part *sub nom. Wolfish* v. *Levi*, 573 F.2d 118

Assuming that the detainees at the MCC "retain[ed] some Fourth Amendment rights," the Court assessed whether the searches were reasonable. *Wolfish*, 441 U.S. at 558. Reasonableness, the Court explained, is assessed by "balancing * * * the need for the particular search against the invasion of personal rights that the search entails," while considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559.

Applying that approach, the Court upheld the challenged searches. The Court assumed that the searches constituted significant intrusions on inmates' privacy rights. *Wolfish*, 441 U.S. at 560. The Court determined, however, that the MCC had a paramount interest in maintaining inmate and officer safety and institutional security. It observed that "[a] detention facility is a unique place fraught with serious security dangers" and that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* at 559. The Court concluded that officials had a significant interest in conducting the challenged searches to respond to that threat, even though there had been only one confirmed instance of an inmate smuggling items by concealing them in a body cavity in the MCC's four-month history, *id.* at 526, 559, 560; see *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977), aff'd in part and rev'd in part *sub nom. Wolfish* v. *Levi*, 573 F.2d 118 (2d Cir. 1978), rev'd *sub nom. Bell* v. *Wolf-*

(2d Cir. 1978), rev'd *sub nom. Bell* v. *Wolfish*, *supra*, as well as Justice Powell's dissent, which suggested that the Court should have required "at least some level of cause, such as a reasonable suspicion," *Wolfish*, 441 U.S. at 563. See also *Powell* v. *Barrett*, 541 F.3d 1298, 1307-1308 (11th Cir. 2008) (en banc).

ish, *supra*. The relatively low incidence of such smuggling, the Court concluded, "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Wolfish*, 441 U.S. at 559.

The Court rejected the argument that the availability of less intrusive alternatives rendered the searches unreasonable. The Court explained that "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable," and, in any event, the primary proposed alternative—metal detectors—"would not be as effective as the visual inspection procedure" because it would not detect "[m]oney, drugs, and other nonmetallic contraband." *Wolfish*, 441 U.S. at 542 n.25, 559-560 n.40.

The Court in *Wolfish* emphasized that "wide-ranging deference" must be afforded to corrections officials. 441 U.S. at 547. The preservation of institutional security, the Court explained, is "[c]entral to all other corrections goals," and judgments about how to achieve that goal "are peculiarly within the province and professional expertise of corrections officials." *Id.* at 546, 548 (citation omitted).

4. Since *Wolfish*, this Court has repeatedly affirmed that courts should play a "very limited role * * * in the administration of detention facilities." *Block* v. *Rutherford*, 468 U.S. 576, 584 (1984). "[P]rison officials," and not the courts, "are to remain the primary arbiters of the problems that arise in prison management." *Shaw* v. *Murphy*, 532 U.S. 223, 230 (2001). Courts should "afford[] considerable deference to the determinations of prison administrators" as they "deal with the difficult

and delicate problems of prison management." *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-408 (1989).

Consistent with the requirement of deference to prison administrators, this Court has clarified that constitutional challenges to prison and jail regulations generally are to be reviewed only for reasonableness. In *Turner* v. *Safley*, *supra*, the Court considered challenges to regulations limiting inmate-to-inmate correspondence and inmate marriages. 482 U.S. at 81. In assessing whether those regulations impermissibly interfered with First Amendment and privacy rights, the Court stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.[6]

Safley addressed whether the heightened scrutiny that would normally apply to limitations on certain constitutional rights is appropriate in the corrections context, rather than the appropriate analysis for reviewing a Fourth Amendment claim. Respondents nevertheless contend (Burlington Resp. Br. 26-29; Essex Resp. Br. 25-29) that *Safley* supplies the operative framework in this case. In the end, however, it makes little difference whether the Court analyzes the case under *Wolfish* or *Safley*. The fundamental question is the same under both inquiries: whether the challenged policies are reasonable ones, given the nature of incarceration and the substantial deference owed to the judgments of corrections officials on matters of institutional security.

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[6] This Court has since made clear that the *Safley* standard does not apply to all constitutional challenges to prison regulations. See *Johnson* v. *California*, 543 U.S. 499 (2005) (declining to apply the *Safley* standard to review a State's policy of racially segregating prisoners).

B. Compelling Interests In Maintaining Jail Safety And Security Justify The Searches In This Case

1. This case concerns the constitutionality of searches conducted as part of a standard intake process for admission of an arrestee to the general jail population. Contrary to petitioner's repeated contention (Br. i, 3, 27), this case does not raise the question whether officials may conduct strip searches of any "individual arrested for [any] minor offense no matter what the circumstances" or of "any person detained for any purpose." The court of appeals addressed only the question "whether it is constitutional for jails to strip search arrestees upon their admission to the general population," Pet. App. 1a, and it carefully limited its holding to the jail policies at issue, see *id.* at 28a. Accordingly, this case does not concern searches of individuals who are being held at a jail in a temporary status and who will be sequestered from the general jail population; searches of individuals who have been arrested but have not been brought to a prison or jail; or searches in institutions other than prisons and jails.

The searches at issue here are comparable in scope to those at issue in *Wolfish*, which involved visual inspection of body cavities as part of a required strip search. Compare *Wolfish*, 441 U.S. at 558 n.39, with Pet. App. 3a-4a, and J.A. 251a-252a, 256a-257a. The searches at issue here also are conducted "in a similar manner and place as those in *Bell* [v. *Wolfish*]—by correctional officers at a detention facility." Pet. App. 19a. They are a step in the standard intake process and last only a few minutes. *Id.* at 20a. Further, as in *Wolfish*, the detainee "is not touched by security personnel at any time." 441 U.S. at 558 n.39; see Pet. App. 3a-4a; J.A. 188a. The Burlington jail's policies require that the

searches be conducted by officers of the same sex, "in private," "in a location where the search cannot be observed by persons not conducting the search," "under sanitary conditions," and "in a professional and dignified manner with maxi[mu]m courtesy and respect for the inmate's person." Pet. App. 19a-20a, 125a, 126a, 129a. Similarly, searches in the Essex jail are conducted by officers of the same sex, in a private shower area, and according to detailed procedures. *Id.* at 140a-144a; J.A. 268a-269a, 286a.[7]

2. The intrusion on inmates' privacy interests is no greater than in *Wolfish*. Petitioner contends (Br. 37) that he had a greater expectation of privacy than the detainees in *Wolfish* because MCC inmates had no right to contact visits and therefore had no expectation they would avoid being searched after those visits. But the reasoning of *Wolfish* did not rest on the proposition that MCC detainees had diminished privacy rights because contact visits were a privilege. To the contrary, the Court in *Wolfish* assumed that the challenged searches constituted a significant intrusion on privacy interests, *Wolfish*, 441 U.S. at 560, and expressly declined to address the court of appeals' unchallenged holding that pretrial detainees have a constitutional right to contact visits, see *id.* at 559 n.40. Nor do the later cases peti-

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[7] Petitioner suggests (Br. 26-27) that the searches at the Essex jail are conducted in an unreasonable manner because several inmates may be in the shower area at one time and because more than one guard may be conducting the searches. But the record in *Wolfish* also showed that multiple inmates were searched at once, and nothing in the Court's decision suggests that having two officers present, rather than one, makes a search abusive. See J.A. at 76-77, *Wolfish*, *supra* (No. 77-1829) (testimony that officials typically "search[ed] several people"—"[a]t least three"—"at the same time"); see also J.A. 302a-303a (one or two officers are in the Essex jail shower area at once).

tioner cites stand for that proposition; they simply affirm that corrections officials may implement regulations that impinge on inmates' freedom, including restrictions on visitation, in order to ensure the security of the detention facility. See *Overton* v. *Bazzetta*, 539 U.S. 126, 131-132 (2003); *Rutherford*, 468 U.S. at 589. Finally, to the extent petitioner seeks to distinguish *Wolfish* on the ground that the contact visits and the subsequent searches involved some element of consent, that was not a basis for the decision in *Wolfish*, and it does not explain why the intrusion on privacy interests is greater here than in *Wolfish*.

3. The governmental interests served by the Burlington and Essex jails' policies are as significant as in *Wolfish*. The jail policies here, like the MCC policy in *Wolfish*, were designed to prevent security risks posed by the smuggling of weapons, drugs, and other contraband into detention facilities. Compare *Wolfish*, 441 U.S. at 558-559, with Pet. App. 20a; J.A. 124a, 323a, 338a.[8]

This Court has recognized that detainees will take advantage of opportunities "to secrete and import [contraband]," and corrections officials need not wait for a series of security breaches before they take action to deal with that threat. *Wolfish*, 441 U.S. at 559; see *Safley*, 482 U.S. at 89 (prison administrators must have "the[] ability to anticipate security problems"). But there is, in any event, ample documentation of the smuggling problem at intake in the record in this and other

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[8] Although respondents offered three security-related concerns that motivated their strip-search policy—detecting and deterring smuggling, identifying gang members, and preventing disease—the court of appeals found that the first involves "the greatest security threat" and is sufficient to justify the jails' policies. Pet. App. 20a-21a.

cases. Essex jail officials reported finding contraband on "newly admitted inmates, inmates returning from court," and "inmates [accepted] from other agencies," and they documented "fourteen investigations of inmates being processed into [that] facility with contraband on their persons in 2007." J.A. 70a-71a. They explained that "contraband is traditionally hidden on the person" during intake—"in a seam of their clothing or in their mouth, in a shoe or in their hair, in their underwear or in an orifice"—and that detainees have "become more ingenious as to where they hide contraband" because they know that "they will be searched upon arrival to a correctional facility." J.A. 71a; see Pet. App. 20a-21a.

Experience in other jurisdictions illustrates the scope of the problem. For example, in one San Francisco jail between April 2000 and April 2005, officials conducting visual body-cavity inspections of incoming arrestees discovered "significant amounts of contraband hidden in and on arrestees' bodies," including concealed weapons such as "a seven-inch folding knife, a double-bladed folding knife, a pair of 8-inch scissors, a jackknife, a double-edged dagger, a nail, and glass shards." *Bull* v. *City and County of S.F.*, 595 F.3d 964, 969 (9th Cir. 2010) (en banc). Officers also found a variety of other items in arrestees' body cavities, including "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana." *Ibid.* One inmate died from drugs obtained within the prison; another inmate "set her clothes on fire with a lighter smuggled into the [jail]"; and another inmate "attempted suicide with razor-blades [he had] smuggled into the jail in his rectal cavity." *Id.* at 967.

These problems are not unique to large cities like San Francisco: news reports from across the country are replete with accounts of arrestees smuggling contraband such as drugs,[9] weapons,[10] and cellular phones[11] into prisons and jails.

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[9] See, *e.g.*, *Deputies: Man Accused of Hiding Cocaine in His Buttocks*, Naples Daily News (Fla.), Nov. 23, 2010, at A8, http://www.naplesnews.com/news/2010/nov/22/deputies-man-accused-hiding-crack-cocaine-his-butt (man arrested on drug charges found with golf-ball-sized bag of crack cocaine in his rectum); Tim Eberly, *Bootlegging Behind Bars: Inmates Use Extreme Measures to Smuggle Drugs, Alcohol into Jail*, Fresno Bee (Cal.), Mar. 2, 2006, at A1, 2006 WLNR 3612174 (woman booked into jail on a warrant "filled two condoms with methadone, tied them, hid them inside her vagina, and used electrical tape to keep them from falling out"); *Granite City Man Accused of Trying To Light Marijuana Cigarette in Jail*, Belleville News Democrat (Ill.), Apr. 18, 2007, at 8B, 2007 WLNR 7263994 (man smuggled marijuana into jail in his rectum, then tore an electrical box apart in an attempt to light a marijuana cigarette); *Kittanning Man Gets 4-8 Years in Jail for Heroin*, Leader Times (Kittanning, Pa.), June 4, 2009, at A3, 2009 WLNR 10717058 (man placed 20 bags of heroin in his rectum before being taken into jail); Sophia Voravong, *Smuggled Cocaine, Marijuana Discovered During Tippecanoe County Jail Book-In*, J. & Courier (Lafayette, Ind.), May 24, 2011, at B3, 2011 WLNR 10331170 (man arrested for marijuana possession found with a small white bag containing cocaine and marijuana in his rectum upon being booked into county jail).

[10] See, *e.g.*, Victor A. Patton, *Investigators Break Up Jail Smuggling Plans: Inmates Found with Contraband Inside their Body Cavities*, Merced Sun-Star (Cal.), Apr. 20, 2010, at A1, 2010 WL 11410027 (inmate hospitalized after trying to smuggle a knife into jail inside his body); Joseph P. Smith, *Jail: Sit and Get Searched*, Daily J. (Vineland, N.J.), July 10, 2010, at A1, 2010 WLNR 2331836 (officers reported that "some inmates cut pockets inside their mouths" in order to smuggle razor blades into the jail).

[11] See, *e.g.*, Thomasi McDonald, *State Says Inmate Hid Cell Phone in His Body*, News & Observer (Raleigh, N.C.), Sept. 22, 2010, at 2B, 2010 WLNR 18770105 (inmate hid red-and-silver "flip-style" cellular

The experience in the federal system is similar. During a recent four-year period in the District of Columbia Superior Court cell block, the United States Marshals Service (USMS) documented at least 30 instances of contraband found on or within the bodies of inmates upon arrival, including narcotics, drug paraphernalia, and a wide variety of weapons, including knives, razor blades, and box cutters. *Bame* v. *Dillard*, 637 F.3d 380, 383 (D.C. Cir. 2011). On one occasion, a female detainee in this cell block "lunged at" a Deputy U.S. Marshal and cut him with a three- to five-inch-long knife that she had "concealed * * * in her vagina." See Compl. attach. at 1, *United States* v. *Washington*, No. 1:10-cr-00169-JDB (D.D.C. Jan. 27, 2010).[12]

The government's interest in detecting and deterring smuggling of contraband at intake is as strong as the interest in preventing smuggling during contact visits.

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phone in his rectum); Lindsay Wise, *Cell Phones Are the New File in a Cake*, Houston Chron., Mar. 17, 2011, at A1, 2011 WLNR 5312345 (official had "an X-ray of an inmate with [a cell phone] in his body cavity, and not only that, but with a charger"). Smuggled phones have been used by prisoners to commit a number of serious offenses, including escape, drug trafficking, and murder for hire. See Tricia Bishop, *Murder on Call*, Balt. Sun, Apr. 26, 2009, at 1A, 2009 WLNR 7913736; Tod W. Burke & Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI Law Enforcement Bulletin, July 2010, at 10; Lisa Trigg, *19 Indicted in Roundup of Alleged Drug Ring: Authorities Say Terre Haute Operation Run out of State Prison in New Castle*, Tribune-Star (Terre Haute, Ind.), Apr. 15, 2010, at C1-C2, 2010 WLNR 7904579.

[12] Petitioner mistakenly suggests (Pet. 14) that the federal view is that visual body-cavity inspections are not required to stop the flow of contraband into prisons and jails. The report petitioner cites does not represent federal policy or experience; rather, it provides one author's conclusion based on his review of the state of the law as of 2007. See William C. Collins, *Jails and the Constitution: An Overview* copyright page (2d ed. 2007).

Petitioner (Br. 28, 36, 38) offers no persuasive reason for distinguishing between the two. See *Powell* v. *Barrett*, 541 F.3d 1298, 1313 (11th Cir. 2009) (en banc) ("[A]n inmate's initial entry into a detention facility" comes "after one big and prolonged contact visit with the outside world."). Although a detainee may have more time to formulate a plan for smuggling in the case of a contact visit as opposed to an arrest, he has less opportunity to obtain contraband (because his visitors must go through security screening) or hide items in his body cavities (because he is being monitored by guards). See *Wolfish*, 441 U.S. at 577-578 (Marshall, J., dissenting); *Levi*, 439 F. Supp. at 140, 147.[13] Moreover, "[n]ot everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice"; "[s]ome people surrender when they are notified that a warrant for them is outstanding," "[t]hose who do not turn themselves in often have notice that officers are coming to arrest them," and even those "who are pulled over and arrested may have time to hide items on their person before the officer reaches the car door." *Powell*, 541 F.3d at 1313-1314. Individuals who self-report may have particular opportunity to smuggle contraband, but smuggling is by no means limited to that group. See pp. 18-21, *supra*.

4. Petitioner repeatedly suggests (Br. 9, 28, 31-32, 39) that the challenged searches are unconstitutional because there are less intrusive alternatives available. That is wrong for two reasons. First, the Fourth Amendment does not require jail officials to use the

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[13] Contrary to petitioner's suggestion (Br. 38), the United States did not argue otherwise in *Wolfish*. Rather, the government explained that while corrections generally monitored contact visits, there was no "individualized monitoring" of each inmate. Gov't Br. at 75-76 & n.57, *Wolfish*, *supra* (No. 77-1829).

least restrictive means to resolve the problem of smuggling at intake. The Fourth Amendment prohibits searches that are unreasonable, and "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable." *Wolfish*, 441 U.S. at 542 n.25, 558-559 & n.40.

Second, petitioner's proposed alternatives are not equally effective in detecting contraband. Contraband hidden in body cavities and small items hidden on an arrestee's person would not be discovered during a pat-down search. A metal detector would not detect "[m]oney, drugs, and other nonmetallic contraband." *Wolfish*, 441 U.S. at 559-560 n.40; see J.A. 71a. Nor would the "Body Orifice Scanning System" (BOSS chair) detect drugs or non-metallic weapons on an arrestee's person or hidden in a body cavity. See J.A. 333a-334a; see also Pet. App. 27a. And the various laws criminalizing possession of contraband in prison and jails (Pet. Br. 39) plainly have not by themselves been sufficient to stop smuggling. See pp. 18-21, *supra*.

5. To the extent there is any question about the need for the searches at issue, prison administrators' judgments on these matters merit "wide-ranging deference" by the courts. *Wolfish*, 441 U.S. at 547. A court may "disagree[] with the judgment of [corrections] officials about the extent of the security interests affected and the means required to further those interests," but it should not "substitut[e] [its] judgment for that of the expert prison administrators" unless their judgment has "been shown to be irrational or unreasonable." *Id.* at 554, 559 n.40. This Court should decline petitioner's invitation to second-guess the judgments of the corrections officials at issue here.

C. Petitioner's Proposed Rule Is Unworkable And Unsupported By Federal Policy Or Practice

1. Petitioner's proposed rule (Br. 2, 10-12), which would draw a constitutional line between persons who have been arrested for "minor" offenses and those who have been arrested for more "serious" offenses, is neither workable nor consistent with federal policy or practice.

Petitioner offers no definition of a "minor" offense, and he never explains how corrections officials and courts should determine which offenses are "minor" and which are not. In the courts below, petitioner argued that it would violate the Fourth Amendment to conduct suspicionless strip searches of individuals arrested for non-indictable offenses (offenses punishable by six months of imprisonment or less). Pet. App. 4a, 21a-25a, 49a, 60a, 65a, 87a. In his brief to this Court, petitioner refers in passing to "a minor offense" as "a 'non-indictable' offense" under state law, Br. 3, but he does not urge the Court to adopt that definition, or, indeed, any other.[14] He further allows that offenses involving drugs or violence may present different questions. Pet. Br. 10, 17 n.8. Accordingly, it is not at all clear whether a "minor" offense, in petitioner's view, means a non-indictable offense, a misdemeanor, an offense that does not involve drugs or violence, or something else.

2. Petitioner is incorrect in claiming (Br. 31) that individuals arrested for "minor" offenses, however de-

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[14] Petitioner also points out (Br. 34) that New Jersey has a system for classifying persons for purposes of determining housing in detention facilities, but that system simply states that classification depends on a number of factors, and it does not purport to identify more and less serious offenses. See N.J. Admin. Code § 10A:31-22.2 (LexisNexis Feb. 22, 2011).

fined, "are not a remotely material source" of the smuggling problem. Individuals arrested for non-violent, non-drug offenses often have attempted to smuggle contraband into prisons and jails.[15] San Francisco jail officials found contraband during visual body-cavity inspections of "arrestees charged with a range of offenses, including non-violent offenses such as public drunkenness, public nuisance, and violation of a court order." *Bull*, 595 F.3d at 969. Weapons and drugs were uncov-

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[15] See, *e.g.*, Diana Bowley, *Inmate Smuggles Joint into Jail*, Bangor Daily News (Me.), Sept. 27, 2006, at B3, 2006 WLNR 16750634 (inmate who self-reported to serve sentence for refusing to submit to arrest smuggled a marijuana cigarette into jail in his rectum); *Man Tried Smuggling Drugs Into Jail by Hiding Them in Rectum, Deputies Say*, Hernando Today (Tampa, Fla.), Mar. 22, 2011, at A2, 2011 WLNR 5655306 (man arrested on probation violation found with methadone, oxycodone, and Xanax in a bag in his rectum); Nicole Marshall, *Third Tulsa Jail Inmate in as Many Weeks Dies*, Tulsa World, Apr. 2, 2010, at A10, 2010 WLNR 6949794 (woman arrested for driving with a suspended license died shortly after her arrival at jail due to a drug overdose from pills she had concealed in a body cavity); Lou Michel, *Gun and Cash Found in Traffic Stop*, Buffalo News, Nov. 7, 2009, at D5, 2009 WLNR 22333928 (crack pipe found in body cavity of man pulled over for failure to wear a seatbelt); Dee Riggs, *Cheeky Inmate Overpacked for Jail Stay, Astonished Cops Say*, Wenatchee World (Wash.), June 3, 2010, at A1, 2010 WL 11410027 (man booked into a county jail on misdemeanor disorderly conduct charge was found with a cigarette lighter, rolling papers, a golf-ball-sized bag of tobacco, a bottle of tattoo ink, eight tattoo needles, an inch-long smoking pipe, and a bag of marijuana all concealed in his rectum); Allan Turner, *Flab Covered the Gun of Jailed Suspect*, Houston Chron., Aug. 7, 2009, at B1, 2009 WLNR 15318536 (man arrested for selling bootlegged CDs was found concealing a nine-millimeter handgun between rolls of fat); Justine Wettschreck, *Conviction Upheld, Petition Denied in Drug Case*, Daily Globe (Worthington, Minn.), Aug. 28, 2010, at A3, 2010 WLNR 17160326 (man passed a plastic bag containing 1.8 grams of methamphetamine in police facility bathroom after being pulled over for traffic violations).

ered during searches in a local cell block that "was used primarily to house not convicts but persons awaiting their appearance in court." *Bame*, 637 F.3d at 387. The Essex jail reported a "great * * * presence of contraband amongst those individuals that have minor offenses." J.A. 348a. "[G]ang members commit misdemeanors as well as felonies," and they are typically "more violent, dangerous, and manipulative than other inmates, regardless of the nature of the charges against them." *Powell*, 541 F.3d at 1311 (citation omitted). Weapons and other contraband are no less threatening in the hands of arrested misdemeanants than in the hands of arrested felons. See, *e.g.*, *Clements* v. *Logan*, 454 U.S. 1304, 1305 (1981) (Rehnquist, J., Circuit Justice) (search policy adopted after "the shooting of a deputy by a misdemeanant who had not been strip-searched").

Even on petitioner's own theory, a holding that persons arrested for "non-indictable" offenses may not be strip searched in the absence of reasonable suspicion would be underinclusive, because it would exempt a number of drug-related and violent offenses. See Pet. Br. 10, 17 n.8. The same would be true of a distinction between misdemeanors and felonies. Any number of drug-related and violent offenses have been classified as misdemeanors, including drug possession,[16] assault and battery,[17] and domestic violence offenses.[18] And either

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[16] *E.g.*, 21 U.S.C. 844(a).

[17] *E.g.*, Md. Code Ann., Crim. Law § 3-203 (LexisNexis Supp. 2010); Mass. Ann. Laws, ch. 265, § 13A (LexisNexis 2010); *id.* ch. 274, § 1; W. Va. Code Ann. § 61-2-9(c) (Supp. 2010).

[18] *E.g.*, Ala. Code § 13A-6-132); (LexisNexis 2005); Ind. Code Ann. § 35-42-2-1.3 (LexisNexis 2009); Kan. Stat. Ann. § 21-3412a (Supp. 2010); Tenn. Code Ann. § 39-13-111 (2010).

distinction would lead to inconsistences among the States, which may classify similar crimes differently.

Moreover, a rule that only persons arrested for certain "serious" offenses may be searched would invite "incarcerated persons * * * to induce or recruit others to subject themselves to arrest on [minor] offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a-24a; see J.A. 382a ("Jail security is only as good as its weakest link.") (report of George M. Camp). This Court acknowledged precisely this risk in upholding a blanket ban on pretrial detainees' contact visits, explaining that if "low security risk detainees" were exempted, they "would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits." *Rutherford*, 468 U.S. at 587. Experience confirms this common-sense conclusion.[19]

3. Limiting searches of incoming inmates to those who have been charged with certain "serious" offenses (at least in the absence of other indications that the inmate may be carrying contraband) also poses administrative difficulties. That is not to say all line-drawing is impossible: the Burlington jail's policy distinguishes between individuals arrested for indictable and non-

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[19] See, *e.g.*, Gregory Gearhart, *Controlling Contraband*, Corrections Today, Oct. 2006, at 24 (officials in Tucson prison received tips that misdemeanants were purposely getting arrested to smuggle drugs inside to friends); Susan Herendeen, *Taped Jailhouse Call Locks Case: Trial Offered Look at Nazi Gang, Drugs and Alliances*, Modesto Bee (Cal.), May 11, 2009, at B2 (Nazi prison gang obtained drugs "from offenders who hide substances in body cavities before they turn themselves in"); Jonathan D. Silver, *Inmate Death Spotlights Prison Drug Trade*, Pittsburgh Post-Gazette, Feb. 28, 2000, at A1 (police commander's account of "people who will get themselves arrested for disorderly conduct" and then "swallow[ing] drugs deliberately before they've gone in").

indictable offenses, see Pet. App. 53a, and federal policy distinguishes between persons arrested for felonies and those arrested for misdemeanors or civil contempt offenses, see pp. 29-30, *infra*. But a constitutional rule that turns on the seriousness of the detainee's offense will inevitably require difficult judgments. In this very case, the district court had considerable difficulty determining whether petitioner should be classified as an indictable or non-indictable offender, because although his most recent arrest was for civil contempt, it was related to a prior incident where petitioner was arrested for obstruction of justice and possession of a deadly weapon. J.A. 25a-28a. The court concluded that "[u]ltimately, the record is not absolutely clear regarding whether [petitioner] was indictable or non-indictable" but that "[o]n balance, * * * it suggests the latter." J.A. 28a. There is no reason to think it will be any easier for corrections officers to distinguish between, for example, violent and non-violent offenses. See J.A. 266a, 272a-273a (testimony that officers do not know basis for arrests or how offenses were classified under state law); see also *Bull*, 595 F.3d at 984-987 (Kozinski, C.J., concurring). The uncertainty resulting from petitioner's approach is particularly inappropriate in light of the potential liability corrections officials face if they guess wrong about what searches are authorized.

4. It is no answer to suggest (Pet. Br. 10, 32) that the circumstances of the arrest themselves could support a finding of reasonable suspicion. Even when jail personnel conducting intake searches know the offense for which the inmate has been arrested, they are not likely to have sufficient information about the circumstances of the arrest. See, *e.g.*, J.A. 383a, 385a (jail staff "rarely receive information about a newly arriving in-

mate that would permit [them] to apply the factors articulated by the courts in determining whether a reasonable suspicion exists") (report of George M. Camp). In some circumstances, jail personnel may need to process many arrestees at once and may have little information about any individual arrestee. See *Bame*, 637 F.3d at 382-383 (individuals arrested in course of mass protest who refused to identify themselves to law enforcement). In the face of limited information, corrections officials may reasonably decide that the best way to preserve institutional security is to ensure that all incoming detainees entering the general population are not concealing weapons or other contraband.

5. Petitioner is mistaken in contending (Br. 2, 14-15, 34) that the federal government concurs in his view that visual body-cavity inspections of "minor" offenders entering the general prison or jail population are unreasonable unless supported by individualized suspicion.

Federal Bureau of Prisons (BOP) regulations permit prison officials to conduct visual body-cavity inspections where "there is reasonable belief that contraband may be concealed on the person, or a good opportunity for concealment has occurred." 28 C.F.R. 552.11(c)(1). The regulations provide that such inspections are authorized, for example, upon the inmate's "leaving the institution" or "re-entry into an institution after contact with the public (after a community trip, court transfer, or after a 'contact' visit in a visiting room)." *Ibid.* In accord with the regulations, BOP policy "requir[es]" that visual body-cavity inspections be conducted when an inmate is "process[ed] * * * into an institution." U.S. Dep't of Justice, BOP, *Program Statement No. 5521.05, Searches of Housing Units, Inmates, and Inmate Work Areas* § 6(b)(1), at 3 (June 30, 1997), http://www.bop.gov/

policy/progstat/5521_005.pdf. There is an exception for individuals arrested for misdemeanors or civil contempt offenses; they are not subject to visual body-cavity inspections unless there is reasonable suspicion that they are concealing contraband or they consent to such a search in writing. U.S. Dep't of Justice, BOP, *Program Statement No. 5140.38, Civil Contempt of Court Commitments* § 11, at 5 (July 1, 2004), http://www.bop.gov/policy/progstat/5140_038.pdf; U.S. Dep't of Justice, BOP, *Program Statement No. 7331.04, Pretrial Inmates* § 9(b), at 6 (Jan. 31, 2003), http://www.bop.gov/policy/progstat/7331_004.pdf. But if a person detained for a misdemeanor or civil contempt offense does not undergo a visual body-cavity inspection, he "must be housed in an area separate from all other inmates" rather than being placed in the general prison population. *Program Statement No. 7331.04, supra*, § 9(b), at 6. Accordingly, BOP policy requires that all pre-trial detainees undergo visual body-cavity inspections before they are placed in the general prison population.[20]

USMS policy authorizes visual body-cavity inspections when "there is reasonable suspicion that the prisoner (a) may be carrying contraband and/or weapons, or (b) considered to be a security, escape, and/or suicide risk." *USMS Directives: Body Searches* § 9.1(E)(3)(a) (June 1, 2010), http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/pod_policy.htm. But significantly, USMS policy provides that "reasonable suspicion" may be based not on circumstances specific to the individual prisoner, but on the "[t]ype and

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[20] Although petitioner (Br. 33) suggests isolating "minor" offenders as an alternative to categorical strip search policies, he does not appear to contend that isolation is a feasible alternative in all or most jail facilities.

security level of [the] institution in which the prisoner is detained" and the "[h]istory of discovery of contraband and/or weapons * * * in the institution in which prisoners are detained." *Id.* § 9.1(E)(3)(a)(5)-(6). Further, USMS policy permits visual body-cavity inspections to be undertaken "as necessary" when a facility is "accepting a prisoner[] from a detention facility, institution, or other inside or outside source * * * due to the prisoner's contact with individual(s) inside or outside the facility and the need for a thorough search for contraband and/or weapons." *Id.* § 9.1(E)(3)(g). Pursuant to that guidance, some United States Marshals in the past implemented policies permitting officers to conduct visual body-cavity inspections of all arrestees entering certain, particularly dangerous cell blocks, although they discontinued the policies out of concern for potential liability, given the uncertain state of the law. See, *e.g.*, *Bame*, 637 F.3d at 382-383.

Different jurisdictions may ultimately choose to adopt different policies. But the Fourth Amendment does not forbid corrections officials from making different judgments about what steps are necessary to respond to security threats in prisons and jails, cf. *Wolfish*, 441 U.S. at 554, and it does not forbid the searches at issue here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2011

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON *ET AL.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF ACADEMICS ON GANG BEHAVIOR AS *AMICI CURIAE* ON BEHALF OF PETITIONER

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IDENTITY OF *AMICI* AND STATEMENT OF INTEREST[1]

Throughout this litigation, the jails have argued that they conduct suspicionless strip searches in part to try to prevent gang violence. That is, the jails claim that performing strip searches, even when there is no reason to suspect any given individual of belonging to a gang, allows the jails to identify members of gangs. *Amici* are all recognized scholars who have contributed to the academic understanding of gangs, tattoos, and prisons. They submit this brief in order to dispute the claims that the jails make about tattoos and gangs. *Amici*'s studies of gangs establish that strip searching detainees at jails does not meaningfully help to identify gang members.

The experts, in alphabetic order, are:

- Alex Alonso, who is a Ph.D. candidate in sociology at the University of Southern California in Los Angeles, California. He is curator of a nationally known website, streetgangs.com; has consulted on over 225 cases involving gangs; and has testified in state, federal, civil and military courts. He has

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their counsel, or the printer made a monetary contribution to this brief's preparation. The parties have consented to the filing of all *amicus* briefs.

published articles in peer-reviewed journals, magazines, and edited volumes. He also produced the award-winning documentary on Los Angeles gangs entitled *Bastards of the Party* (2005) for HBO.

- Rosemarie Ashamalla, who received her Ph.D. in anthropology from the University of California, Los Angeles in 1999. She is the executive director of the non-profit Sunrise Community Outreach Center in Los Angeles, California, which offers low or no-cost tattoo removal to individuals transitioning away from life in gangs. Sunrise Outreach specializes in counseling former gang members, former detainees reentering society, and recovering drug addicts.
- David Brotherton, who is the chair and a professor of sociology at John Jay College of Criminal Justice in New York, New York. He has co-authored or co-edited five books on gangs, and he is presently finishing work on two manuscripts: one dealing with individuals deported to the Dominican Republic, and the other on transnational street gangs. He is an expert on gangs based in New York and on the East Coast, including the Almighty Latin King Queen Nation.
- John Hagedorn, who is a professor of criminology, law, and justice at the University of Illinois-Chicago. He has researched gangs for more than 25 years, beginning in Milwaukee, Wisconsin, and for the last 15 years in Chicago. He has written two books on gangs – PEOPLE & FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY (2d ed. 1997), and A WORLD OF GANGS: ARMED

YOUNG MEN AND GANGSTA CULTURE (Globalization and Community) (2009) – and edited two more. He has written dozens of book chapters and articles in peer reviewed journals, as well as many popular articles. In 1995, he was hired by the National Institute of Justice to train NIJ researchers in the techniques of gang research. He has consulted in approximately 50 gang-related court cases.

- Cheryl Maxson, who is an associate professor of criminology, law and society at the University of California, Irvine. Professor Maxson is co-author of STREET GANG PATTERNS AND POLICIES (2006) and RESPONDING TO TROUBLED YOUTH (1997), both published by the Oxford University Press. She is co-editor of THE EUROGANG PARADOX: GANGS AND YOUTH GROUPS IN THE U.S. AND EUROPE (2001) and THE MODERN GANG READER (1st ed. 1995; 2d ed. 2001; 3d ed. 2006). Her articles, chapters, and policy reports concern street gangs, youth violence, juvenile justice legislation, drug sales, community policing, and community treatment of juvenile offenders. She has served as the president of the Western Society of Criminology, where she was honored as a fellow. She also has served as executive counselor of the American Society of Criminology, and as the associate editor of its journal, Criminology.

- Jody Miller, who is a professor and associate dean at the School of Criminal Justice at the Rutgers University (Newark), in New Jersey. She earned a Ph.D. in sociology from the University of Southern California in 1996. Her research focuses on gender, crime, and victimization in the

contexts of urban communities, the commercial sex industry, sex tourism, and youth gangs. Among other awards, Professor Miller has been elected as the executive counselor of the American Society of Criminology for 2009, and she has received the University of Missouri-St. Louis Chancellor's Award for Excellence in Service in 2007.

- Susan Phillips, who is an assistant professor at Pitzer College in Claremont, California. She received a Ph.D. in anthropology in 1998 from the University of California, Los Angeles. She has conducted field research on gangs in African American and Latino neighborhoods since 1990, and has written about gang tattoos and tattoo removal. Her first book, WALLBANGIN: GRAFFITI AND GANGS IN L.A. (1999), published by the University of Chicago Press, dealt extensively with gang symbols. Her second book on gangs, OPERATION FLY TRAP: GANGS, DRUGS, AND THE LAW (2012), will also be published by the University of Chicago Press. She was named a Soros Justice Media Fellow in 2008.
- T.W. Ward, who is an associate professor of anthropology at the University of Southern California in Los Angeles, California. He has conducted gang research since 1993, mainly with Central American gang members in the United States and El Salvador. His upcoming book on the Mara Salvatrucha gang, GANGSTERS WITHOUT BORDERS (2012), will be published by the Oxford University Press.

As experts on gangs, *amici* seek to ensure that this Court has at its disposal empirical evidence

related to gangs and tattoos. *Amici* collectively have decades of knowledge on gangs. They have conducted in-depth research on various types of gangs nationally and internationally. This includes close field-studies of gangs and gang members, statistical analyses, and study of the role of tattoos and tattoo removals in gang populations.

Many of the *amici* have previously served as gang experts for state, federal, and immigration courts, for both the government and defendants. They have studied several of the most prominent gangs in the United States, including Bloods, Crips, Mara Salvatrucha, 18th Street, the Almighty Latin King Queen Nation, and other national and regional gangs.

Amici hope to contribute to this Court's understanding of gangs generally and the role of tattoos in specific.[2]

SUMMARY OF ARGUMENT

The *amici* assert that placing tattoos on skin beneath a person's underpants is not a widespread gang practice. Therefore, the performance of suspicionless strip searches at jails will not help to

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[2] *Amici* note that much of their knowledge of gang behavior, and specifically the role of tattoos, comes from their own field experience and study. Some published works deal with these topics, and are noted in this brief. Equally important, though, are the research and observations of *amici* themselves, which do not necessarily have published sources.

identify gang members. Gang members use tattoos to communicate their gang membership. Therefore, they usually locate tattoos on visible skin, as well as on some bodily regions that, while hidden by clothing, can be easily exposed. Male gang members do not tend to place tattoos on skin hidden by underpants. Women who have interacted with gang members, or who are active gang members themselves, sometimes do place tattoos in private areas. But rather than indicating gang membership, these tattoos signify individual sexual relationships with male gang members, some of whom have abused the women.

If a gang member were to place a gang-related tattoo on skin hidden by underpants, gang tattoos would also likely be evident on other parts of the body, and therefore would not require a strip search to identify. Further, gang tattoos by themselves are not a reliable proxy of active gang membership. Many individuals who receive gang-related tattoos as young people later leave their gangs. Relying on older tattoos to identify gang members could be misleading and harmful.

There is almost no support for the claim that gang members hide gang identity in a below-the-belt region. Indeed, gang members tattoo their private areas so rarely that a jail official who sees a tattoo only on a detainee's intimate parts might question whether the mark is a contra-indicator to gang membership. *Amici* agree it is important for jails to identify gang members to preserve order and to protect jail employees and other detainees. There are several methods of making such identifications, including conducting inspections for prominently displayed tattoos. But using suspicionless strip

searches to examine the private bodily areas of all detainees simply does not advance the goal of identifying gang members.

ARGUMENT[3]

I. The jails claim that suspicionless strip searches help to identify gang members entering jails.

The jails have repeatedly argued during this litigation that they must strip search all detainees in order to identify gang members. And the Third Circuit relied on this argument at least in part in sanctioning the jails' practices.

For instance, in their argument to the Third Circuit, the jails made clear that identifying gang members was one of their three primary goals in conducting strip searches. See *Florence* v. *Bd. of Chosen Freeholders of the Cty. of Burlington*, (3d Cir. 2010), Pet. App. 1a, 18a (stating that jails justify strip searches on the basis that they are helpful to

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[3] For the purposes of this brief, *amici* define strip-searching as the observation of a nude body, with or without a cavity search. *Amici* limit their conclusions to the context of jail, where arrestees are generally not convicted felons, and where some arrestees—as in the case here—are not indicted on criminal charges. Thus, *amici*'s argument only addresses the jails' assertion that they strip search arrestees in order to discover gang-related tattoos.

"eliminating weapons and drugs from the jail environment, serving to mitigate gang violence and preventing disease.") (quoting filings from jails).

In their briefs opposing *certiorari* in this case, the jails continued to rely on the identification of gang members to justify suspicionless strip searches. The Burlington Respondents wrote that "the summary judgment record documented . . . the increasing need to identify gang members upon their entry into the institution." Burlington Respondents' Cert. Op. at 18-19. They continued that "the Burlington County jail and its officers have been subjected to litigation about whether they adequately protected against gangs." *Id.* at 20, n.9. The Burlington Respondents claimed that using techniques other than strip searches to identify gang members would allow jail personnel to exercise too much subjectivity, and so might raise Equal Protection concerns. *Id.* at 23. And they conclude by asserting that gang identification is a sufficient "risk factor" to justify strip searches of detainees. *Id.* at 24. The opposition to *certiorari* by the Essex Respondents also points to gang violence to justify strip searches. See Essex Respondents' Cert. Op. at 6-7, 15.

The Third Circuit also partially relied on the identification of gang members as a reason to justify suspicionless strip searches. It wrote that its conclusion relied only on excluding contraband, rather than identifying gang members *per se*. *Florence*, Pet. App. 28a n.9. But under the guise of security, the Third Circuit still claimed that the jails needed to use strip searches to identify gang members, because "gang members would be likely to

exploit an exception from security procedures for minor offenders." *Id.* at 24a.

As is discussed below, *amici* dispute that suspicionless strip searches help to identify gang members entering jails.

II. Gang members display tattoos prominently, not in private bodily areas that strip searches examine.

Contrary to the jails' claims, strip searches do not meaningfully help to identify gang members. This is because gang members usually do not tattoo areas covered by underpants, and when they do gang members usually display other tattoos in areas that are visible without conducting strip searches. Gang members use their tattoos largely as a form of communication, to quickly and easily convey their affiliation to others. Such public proclamations of gang affiliation provide a basis for determining whether another person is a potential friend or foe.[4]

Gang tattoos, also known among academics as "signifiers," range from numbers, letters, and figures to generic symbols of gang life. They also include general jailhouse or religious iconography. As one

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[4] See, *e.g.*, Margo Demello, *The Convict Body: Tattooing Among Male American Prisoners*, 9 ANTHROPOLOGY TODAY 10 (1993); William Riley, *Interpreting Gang Tattoos*, CORRECTIONS TODAY 46 (Apr. 2006); Bill Valentine, GANGS AND THEIR TATTOOS: IDENTIFYING GANGBANGERS ON THE STREET AND IN PRISON vii (2000).

retired law enforcement officer has written, "[o]f all the identifiers used to verify gang membership, tattoos are one of the most pervasive and reliable. Not only are they relatively permanent, but they convey a wealth of information about the wearer." Valentine, GANGS AND THEIR TATTOOS, *supra*, at vii. See also William Riley, *Interpreting Gang Tattoos*, CORRECTIONS TODAY 46, 46 (Apr. 2006) ("Tattoos are part of a process of nonverbal communication used by gang members. Without the need to verbally communicate, a gang member, as well as observant nongang members, can identify a fellow gang member or rival") (statement of former corrections officer).

Significantly, gang members in part use their tattoos so that others can spot their affiliation from a distance. This form of identification occurs when individuals encounter each other in neighborhoods, or in jails and prisons. Because of the importance of communicating quickly and from a distance, most gang members tattoo in places that are either quite visible, or easily revealed. As a result, "the tattoos themselves are usually on extremely public areas of the body where they can be easily read by others." Demello, 9 ANTHROPOLOGY TODAY at 10. See also Herbert C. Covey, STREET GANGS THROUGHOUT THE WORLD 141 (2010) (gang members use tattoos to "cover much of their upper bodies, including their faces").

Gang members commonly place tattoos in prominent or easily displayed areas of their bodies, including: scalp, face, hands, neck (front, sides, back), earlobes, chest, back, stomach, small of back, arms, and legs (including sometimes calves and shins). It is

uncommon for gang tattoos to appear in more obscured areas, such palms, feet, knees, or beneath underpants. Tattoos in such areas are difficult for others to notice, and so do not effectively serve to communicate gang identity.

Gang members usually tattoo gang names, initials, and insignia on several locations on the body. And despite the ability of large tattoos to communicate affiliation at a distance, gang tattoos can vary in size, complexity, and visibility. Smaller initials and numbers often appear on members' hands or faces; medium-sized images are frequent on necks and arms; larger images commonly appear on chests or backs. Gang references may also be incorporated into larger-scale designs, such as on the back, chest, or as "sleeves" on the arms. "Often one's level of gang identity can be gauged by the amount and type of tattoo. Some might only place a small dot (•) or cross (†) on their hand, between the thumb and forefinger, while others, especially the committed veterans, might cover large parts of the body with a very elaborate art form." James Diego Vigil, BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA 115 (1988).

None of the literature on gang tattoos that *amici* have surveyed refers to gang tattoos on skin beneath underpants. There are rare instances of people placing gang-related tattoos in private regions, but the practice is not common. Even if gang-related tattoos exist on skin beneath underpants, in almost all cases these would merely supplement tattoos visible on more accessible parts of the body.

Outside of gangs, some individuals do indeed place tattoos on skin hidden by underpants, including their genitalia. Genital piercings may also be found among certain individuals. But, as is discussed above, this conduct is very rare among gang members. Indeed, gang members tattoo their private areas so rarely that a jail official who sees a tattoo only on a detainee's intimate parts might question whether the mark is a contra-indicator to street gang membership.

Amici understand and agree that jails need to identify gang-affiliated individuals for security reasons. This is true in New Jersey, where relatively high numbers of gang members cycle through the jail system. *Amici* also agree that tattoos help to identify gang members. According to one correctional officer:

> When corrections and law enforcement personnel learn to read tattoos and their meanings, that knowledge can be used to identify gang members in correctional facilities. Once gang members are appropriately identified, facility managers have more information to house offenders appropriately, diminishing the violence levels that occur with gang activity.

Riley, CORRECTIONS TODAY, *supra*, at 53. But tattoos must be used in tandem with other methods used for gang validation. As noted criminologists G. David Curry & Scott Decker have written, "[a] tattoo is perhaps the most severe outward indication of membership, but there are others." David Curry & Scott H. Decker, CONFRONTING GANGS: CRIME AND COMMUNITY 7 (2d ed. 1998). These include correspondence, photos, court records, known

associates, admission of membership by the detainee, and information gleaned from informants.

Further, in *amici*'s experience, courts usually require the existence of at least three indicators to confirm that a witness or defendant is a member of a gang. Even if jail authorities were to use only tattoos for gang identification as a proxy for gang membership during initial screening of detainees, the ready visibility of the overwhelming majority of gang tattoos means that jails can effectively screen for tattoos without strip searching every detainee.

III. Women's intimate tattoos usually mark sexual relationships, and can signal coercion and abuse rather than active gang affiliation.

While the above discussion applies to both men and to women, women who have had interactions with male gang members sometimes do have tattoos on the small of the back, on the buttocks, or in the "bikini area." See, *e.g.*, Wendy L. DeBoer, THERE GOES THE NEIGHBORHOOD: TATTOO REMOVAL, STIGMATIZATION, AND THE CONTEXT OF CULTURE 94 (unpublished dissertation, University of Southern California) (2004). It is important to emphasize, however, that these tattoos do not normally reference gang membership. Rather, tattoos on women's intimate areas usually relate to specific, sexualized, male-female relationships. In short, male gang members use tattoos to literally place their marks on women. While women may be members of gangs, the existence of tattoos in women's private areas does not help to establish such membership. Rather, women gang members may also have more prominent

tattoos, like those discussed above; conducting strip searches does not facilitate finding those more visible gang-related tattoos.[5]

Academic literature on gangs contains very little discussion of tattoos on women, and almost none on tattoos in women's private areas. But, in *amici*'s research experience, the majority of women's intimate tattoos are not gang signs. Rather, they are generic, sexualized designs; or the names of men who ask, encourage, or demand that women tattoo their names on sexual areas. Tattooing men's names in both hidden and more visible regions is common among women in gang contexts. According to one expert, "the women's acquisition of men's names carried the additional significance of men's 'owning' the women who named them and women's 'belonging' to these men." DeBoer, THERE GOES THE NEIGHBORHOOD, *supra*, at 161. But rather than indicating active membership in gangs, women's intimate tattoos can signify current or former abuse and control by men.

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[5] On women, even prominent gang tattoos on visible body parts may not indicate active gang membership. As one authority has written, "[w]omen I interviewed who did not consider themselves to be gang members acquired many of the same tattoos that gang members did." DeBoer, THERE GOES THE NEIGHBORHOOD, *supra*, at 137. One woman "was tattooed with a gang name while she was passed out." *Id.* at 93. The *amici* have heard many accounts in which abuse and tattooing overlap.

For example, one woman's male abuser tattooed his name onto her pubic region, using a homemade tattoo gun. She bore the name "Babar" in her genital region for many years before having the tattoo removed. Another woman had the name "Spaceride" tattooed on her lower back. This region of her body would have been at least partially covered by underpants, and so would be revealed in a strip search. But the revealed tattoo would not indicate that the woman belonged to a gang. This is because the term "Spaceride" combined the nickname of the woman's abusive ex-boyfriend, Spacey, with a slang term with sexual overtones. Another example is a woman who covered *exposed* parts of her body with tattoos linked to a prison gang. But this woman had no gang-related tattoos in her underpants region. She did have a tattoo on her lower back, in an area that might have been hidden by her underpants, stating "Scotty's Ride." This has the same general formulation – a male sexual partner's name combined with a slang term with sexual overtones – as in the previous example. If this woman were sent to a jail, her prominent gang tattoos would identify her as a potentially active gang member, and a strip search would add no additional information.

Nor do *amici* anticipate that a gang tattoo—if it did exist on a woman's body beneath her underpants—would serve as a reliable proxy of her own gang membership. Rather, if such a gang-related tattoo were to appear on a woman's intimate areas, it would more likely evidence the sort of male abuse or control discussed above.

In short, with regard to women, tattoos located beneath underpants do not stand for what the jails

claim. Because on women there is no clear empirical link between gangs and intimate tattoos, there is no reason to conduct strip searches of women to expose them.

IV. Male gang members rarely place tattoos on their genitalia or skin covered by their underpants.

In their research, *amici* have encountered very few examples of male gang members who have tattooed their genital or private regions. In the few instances in which *amici* have heard of such tattoos, the marks were either not linked to gangs, or supplemented other more clearly gang-related tattoos that the individuals wore on more prominent body parts.

Significantly, most of the instances of this conduct that *amici* have encountered were located among the population of convicted prisoners in California. California has a much more significant gang presence than does New Jersey. And convicted prisoners likely have a higher percentage of gang members than detainees in jails who have not been convicted. Given that *amici* see so little tattooing below the belt in California's gang-heavy prisoner population, it seems *less* likely still that the jails in New Jersey in this case will encounter such tattoos.

Thus, there is very little evidence to support the jails' assertion that gang members tattoo below the belt in order to hide gang identity. In the academic experience of *amici*, the opposite is true. Conversations between *amici* and gang-related and jailhouse tattoo artists, gang members, tattoo removal participants, and law enforcement

personnel, including gang specialists, all indicate that gang tattooing below the belt is extremely uncommon.

There are several reasons for this. As is discussed above, gang tattoos serve to communicate gang affiliation, and hidden tattoos by definition cannot advertise membership. In addition, gang cultures often emphasize hypermasculinity and homophobia. These characteristics likely prevent males from obtaining tattoos in private regions. That is, gang members may associate certain intimate bodily locations, such as the buttocks or bikini line, with females, and might view placing tattoos there as feminine and therefore inappropriate for men. Further, a male receiving a tattoo on his intimate body parts might require another man to touch the intimate areas. The homophobic culture of male gangs would likely prevent such conduct.

Simply put, for a gang member "[t]o *outwardly* mark his or her body with the gang's symbol is viewed as a privilege." Louis Kontos & David Brotherton, ENCYCLOPEDIA OF GANGS 75 (2008) (emphasis added). Hidden tattoos have no such effect.

V. Because many people leave gangs, tattoos by themselves do not reliably indicate active gang membership.

Having a gang tattoo, regardless of placement, does not necessarily constitute active gang membership. This is because many people have who received gang-related tattoos subsequently leave gangs. See, *e.g.*, DeBoer, THERE GOES THE NEIGHBORHOOD, *supra*, at 78; J. Korman, *Removal of*

Gang-Related Tattoos, 162 W. J. OF MED. 541 (1995). However, it is very difficult for former gang members to remove their tattoos immediately when they leave their gangs, and most remain unable to do so. *Amici* have learned of a sixty-year old woman who removed tattoos she got when she was fifteen. One man received tattoo removal treatment in his seventies for gang signs tattooed during his teen years. The many people who remove tattoos years after receiving them indicate that a given gang tattoo may be a relic. Indeed, despite the growth of the tattoo removal industry, the majority of people who would like to remove gang tattoos are unable to do so. "Tattoo removal can cost several thousand dollars, and often former gang members cannot afford it." Korman, 162 W. J. OF MED. at 541. Therefore, uncovering a gang tattoo during a routine search could be misleading. Worse, placing a former gang member with active gang members solely on the basis of tattoo could lead to violence. As is stated above, additional measures besides tattoo identification are necessary to determine active gang membership.

* * * * *

In the experience of *amici*, suspicionless strip searches are not necessary or even helpful to identify gang members within the context of a jail. The rarity of gang tattoos beneath underpants, the ease with which gang tattoos are found on visible parts of the body, and the need to combine tattoo identification with other validation methods all indicate that strip searches do not help to identify gang members detained in jails. Male gang members generally do not tattoo on skin hidden by underpants. And when they do, other gang tattoos are usually present in

more visually accessible locations. Women who have interacted with gangs and who place tattoos in intimate areas generally have tattoos that do not signify active gang membership. Rather, they stem from relationships or sexual liaisons with male gang members, and can result from coercion or abuse. Searching for such private tattoos on women do not aid in gang identification. In addition, finding a gang tattoo is not by itself necessarily a reliable way to determine active membership in a street gang. Therefore, there is little if any basis for the jails to use suspicionless strip searches to identify gang members.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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June 27, 2011

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

JUN 27 2011

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETTTIONER

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA requests that the Court consider the broad-based consensus views embodied in the ABA's criminal justice standard on strip searches when deciding whether routine, suspicionless strip searches of minor offender arrestees should be permitted upon their admission to detention facilities.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.[2]

The ABA began its comprehensive study of the criminal justice system in 1964 under the aegis of

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed written consent to the filing of amicus briefs pursuant to Rule 37.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

then-ABA President Lewis F. Powell, Jr.[3] The first full edition of the ABA STANDARDS FOR CRIMINAL JUSTICE was published in 17 volumes in 1974.[4] With broad input from the criminal justice community, this study has included prison conditions and practices, and has resulted in the development and refinement of model standards to guide officials in the safe and secure administration of prisons. Addressing current conditions and challenges, the ABA has recently published a new version of Volume 23, THE TREATMENT OF PRISONERS (2010).[5]

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[3] A history of the development of the ABA STANDARDS FOR CRIMINAL JUSTICE is available on the website of the ABA's Criminal Justice Section, http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited June 24, 2011). Also available on the ABA website is Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST. Winter 2009 at 10, 14-15 (describing the careful and balanced process by which the Standards are developed and promulgated).

[4] The ABA STANDARDS FOR CRIMINAL JUSTICE is now published in 23 volumes by subject matter. Each standard becomes ABA policy after adoption by the ABA's House of Delegates. The House of Delegates is composed of over 560 delegates representing states and territories, local and state bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, http://www.americanbar.org/leadership/delegates.html (last visited June 24, 2011).

[5] The "black letter" standards of The Treatment of Prisoners were adopted by the ABA House of Delegates in 2010, and are available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf (last visited June 24, 2011). The commentary for these standards was recently approved and is available at http://www.americanbar.org/

ABA Criminal Justice Standard ("ABA Standard") 23-7.9(d) of this volume concerns strip searches of pretrial detainees upon their admission to a detention facility. As set out in this Standard, the ABA has concluded that individualized reasonable suspicion should be present in order to conduct a strip search of an individual arrested for a minor offense that does not involve violence or drugs.

SUMMARY OF ARGUMENT

Nearly 14 million Americans are arrested each year. Many of these arrests are for misdemeanor offenses or civil infractions that – like the offense of which Petitioner was accused – do not involve violence or drugs and do not suggest a motive or opportunity to smuggle contraband into a prison. Neither Petitioner nor this majority of arrestees should be subject to the grave intrusion of a strip search on admission to a detention facility unless there is individualized, reasonable suspicion of possession of contraband.

ABA Standard 23-7.9(d) encapsulates this approach to strip searches in prisons. In doing so, the Standard reflects this Court's traditional Fourth Amendment approach of taking into account all the surrounding facts and circumstances of the search, including the reason for an arrestee's initial apprehension, in order to determine whether a search is reasonable. More specifically, the Standard is consistent with this Court's precedents requiring that an appropriate balance be struck between the

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content/dam/aba/publishing/criminal_justice_section_newsletter/treatment_of_prisoners_commentary_website.authcheckdam.pdf (last visited June 24, 2011).

invasion of personal rights and the government's interest in maintaining secure prison facilities.

ARGUMENT

I. The ABA Standard on Strip Searches Strikes the Proper Balance Between Personal Rights and Prison Security.

The ABA's comprehensive study of the American criminal justice system has long included consideration of the principles and functional parameters needed to operate jails and prisons for the safe, secure, and humane incarceration of prisoners and detainees.[6] The ABA's standard concerning strip searches, Standard 23-7.9(d), supports a careful balancing of detainees' rights with the security needs of correctional facilities. It also reflects the reality that 14 million Americans are arrested each year but, as in Petitioner's case, many of these arrests are for misdemeanor offenses or civil infractions that do not involve violence or drugs and ordinarily do not suggest a

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[6] The resulting standards, contained in Volume 23 (THE TREATMENT OF PRISONERS) of the ABA STANDARDS FOR CRIMINAL JUSTICE, were developed from the consensus views of a broad range of correctional system professionals, including current and former chief administrators and counsel of major correctional systems, prosecutors, defenders, judges, and representatives of the American Correctional Association and the U.S. Department of Justice, among others. *See* THE TREATMENT OF PRISONERS, at I-III, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf (last visited June 24, 2011).

motive or opportunity to smuggle contraband into a prison.[7]

ABA Standard 23-7.9(d) therefore provides that detainees[8] like Mr. Florence, who are arrested and detained for minor, non-violent, non-drug-related offenses, should be strip searched only when there is individualized, reasonable suspicion that they have contraband:

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[7] *See* Criminal Justice Info. Servs. Div., Fed. Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States tbl.29 (2009), *available at* http://www2.fbi.gov/ucr/cius2009/data/table_29.html (last visited June 24, 2011); *see also* N.Y. State Div. of Criminal Justice Servs., Crime in New York State: 2010 Preliminary Data (2011), *available at* http://criminaljustice.state.ny.us/pio/annualreport/2010-crime-in-nys-preliminary.pdf (last visited June 24, 2011). A large percentage of arrests in the United States are for misdemeanor offenses and civil infractions. For example, in New York City in 2010, 343,308 people were arrested. Of this number, 251,169 arrests, or nearly three-quarters of the total number of arrests, were for misdemeanor crimes or civil infractions. N.Y. State Div. of Criminal Justice Servs., Adult Arrests 2001-2010: New York City (2011), *available at* http://www.criminaljustice.state.ny.us/crimnetlojsa/arrests/nyc.htm (last visited June 24, 2011); *cf.* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 283-84 (2009) (discussing the distribution of minor offense arrests in New York City in greater detail).

[8] This brief uses the term "detainees" to describe individuals who have been arrested and, following upon that arrest, have been taken into initial detention in holding cells or detention facilities, including jails and prisons. *See* ABA Standard 23-1.0(i). ABA Standard 23-7.9(d) specifically addresses strip searches of such detainees. Detainees, as that term is used herein, are thus a subset of a larger universe of detained individuals referred to as prisoners.

> (d) Visual searches of a prisoner's private bodily areas, whether or not inspection includes the prisoner's body cavities, should:
>
> . . .
>
> (ii) be permitted only upon individualized reasonable suspicion that the prisoner is carrying contraband, unless the prisoner has recently had an opportunity to obtain contraband, as upon admission to the facility, upon return from outside the facility or a work assignment in which the prisoner has had access to materials that could present a security risk to the facility, after a contact visit, or when the prisoner has otherwise had contact with a member of the general public; *provided that a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit.*

ABA Standard 23-7.9(d) (emphasis added).[9]

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[9] Minor offenses are defined differently across jurisdictions but typically include misdemeanor offenses and civil infractions – offenses that may warrant a fine or citation, but do not typically warrant extended jail time. Numerous jurisdictions have made a similar distinction in their law on strip searches of detainees. *See, e.g.*, Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5140.38, Civil Contempt of Court Commitments § 11 (2004), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc (last visited June 24, 2011) ("Detainees charged with misdemeanors, committed for civil

As an initial matter, the Standard recognizes that a strip search is a grave and inherently degrading intrusion on an individual's rights, and therefore should not be carried out on every person who is arrested. In this case, Mr. Florence, who was arrested for a minor offense (despite his proof that he had resolved the matter, ultimately resulting in his release without charge), was strip searched twice: once within the close quarters of an eight-foot stall, where the supervising officer inspected Mr. Florence's mouth, tongue, armpits, buttocks, and genitals, and once when he was forced to strip off his clothes in a shower area with a group of four other prisoners, all of whom were required to open their mouths, lift their genitals, and "squat and cough" in plain sight of one another. J.A. 255a-257a.

This Court, like numerous other courts, has recognized the humiliating nature of strip searches like the ones endured by Mr. Florence. *See Bell v. Wolfish*, 441 U.S. 520, 560 (1979) ("We do not underestimate the degree to which these searches may invade the personal privacy of inmates."); *see also, e.g.*, Pet. App. 19a (noting that strip searches constitute an "extreme intrusion on privacy"); *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) ("[A]

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contempt (without also serving a concurrent criminal sentence) or held as material witnesses may not be searched visually unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband."); Va. Code Ann. § 19.2-59.1 ("No person in custodial arrest for a traffic infraction, Class 3 or Class 4 misdemeanor, or a violation of a city, county, or town ordinance, which is punishable by no more than thirty days in jail shall be strip searched unless there is reasonable cause to believe on the part of a law-enforcement officer authorizing the search that the individual is concealing a weapon."); *see also* sources cited *infra* notes 13-14 (discussing other jurisdictions).

strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual" (citation and internal quotation marks omitted)).

At the same time, ABA Standard 23-7.9(d) recognizes that contraband in correctional facilities presents a serious threat to the safety and security of correctional officers and prisoners. Therefore, the inherently invasive and degrading nature of strip searches must be balanced carefully with the actual and likely security risks to which the searches are addressed.

Recognizing the serious security concerns in prison facilities, the ABA Standard acknowledges that a strip search may be necessary whenever particularized circumstances create reasonable suspicion, even for detainees charged with very minor offenses. In addition, the ABA Standard concludes that the balance tips in favor of allowing routine strip searches when detainees charged with serious, violent, or drug-related offenses are admitted to a detention facility. Under these circumstances, the nature of the charged offense increases the risk to security such that it outweighs the intrusiveness of the search.[10]

There is little reason, however, to believe that a strip search of a detainee like Mr. Florence is necessary to protect prison security. Under ABA

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[10] Moreover, consistent with this Court's conclusion in *Bell*, 441 U.S. at 559 & n.40, ABA Standard 23-7.9(d) recognizes that, in order to preserve prison security, it may be necessary to strip search pretrial detainees who elect to engage in loosely supervised contact visits and therefore may have opportunity and possible motive to acquire contraband.

Standard 23-7.9(d), then, the balance tips against allowing searches without individualized suspicion when these detainees are admitted to a prison.

First, these arrests typically come as a surprise. There is thus no motive prior to arrest – and limited opportunity during the arrest – to plan to smuggle contraband into a prison. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001). In an analogous situation, this Court has noted the improbability of the hypothetical that an officer will "stumble onto" contraband during a detention for a traffic violation. In *Knowles v. Iowa*, 525 U.S. 113 (1998), the state sought authority to perform full vehicle searches incident to detentions for traffic violations. Then Chief Justice Rehnquist, writing for the Court, rejected the state's argument on the ground that it was highly unlikely that the search of a detainee's vehicle would recover evidence or contraband from crimes other than the traffic violation. The Court explained that "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." *Id.* at 118.

The possibility that prison officials will discover contraband in a strip search of a minor-offender detainee is even more remote. Even if it were conceivable that an individual might plan an arrest in order to smuggle contraband into a prison, detainees have no control over the institution in which they are placed or the prisoners with whom they will come into contact once there. Moreover, a detainee who seems too willing to be arrested may generate reasonable suspicion justifying a strip search in a particular case, even where the arresting offense is a misdemeanor unrelated to drugs or

violence. *Cf. Miller v. Yamhill County*, 620 F. Supp. 2d 1241, 1246 (D. Or. 2009) (upholding a strip search based upon reasonable suspicion where an individual self-reported to a jail in which he had previously been incarcerated).

Second, arrests for drug-related or violent offenses present an obvious risk that – despite the lack of advance warning – detainees might have had an opportunity to secrete drugs or weapons during an arrest. That risk is not present to the same degree, however, when a person has been arrested for a minor, non-violent, non-drug-related offense. A blanket strip search policy assumes that all arrestees, regardless of the basis for arrest, may possess contraband and will attempt to conceal it on their persons. *Cf.* William C. Collins, Nat'l Inst. of Corr., U.S. Dep't of Justice, Jails and the Constitution: An Overview 35-36 (2d ed. 2007), *available at* http://static.nicic.gov/Library/022570.pdf (last visited June 24, 2011) (concluding based on a "substantial amount of data" that "officials were not able to show that people arrested on the street for minor offenses were likely to be carrying contraband that wouldn't be discovered in a search less intrusive than a strip search").[11]

A strip search of detainees like Mr. Florence upon admission to a prison, without some other

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[11] Clearly, detainees may be subjected to searches and security measures (*e.g.*, pat-down searches and confiscation of belongings) that do not involve strip searches. *See, e.g.*, Judy Haney, Statement to Commission of Safety and Abuse in America's Prisons, (Apr. 19, 2005), *available at* http://www.prisoncommission.org/public_hearing_1_witness_haney.asp (last visited June 24, 2011) (describing intrusive nature of pat-down searches in prison setting).

individualized reasonable suspicion, is not justified by security concerns, and is therefore inconsistent with the respect for the human dignity of prisoners to which the ABA is deeply committed. *See* ABA Standard 23-1.1(d) ("No prisoner should be subjected to cruel, inhuman, or degrading treatment or conditions.");[12] *cf.* ABA, JUSTICE KENNEDY COMMISSION REPORT TO THE HOUSE OF DELEGATES 4 (2004) ("A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people." (quoting Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003))). Indeed, where a search is not reasonably related to a legitimate goal, "a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell*, 441 U.S. at 539.

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[12] The commentary to ABA Standard 23-1.1(d) points out that the language "cruel, inhuman or degrading" is derived from Article 5 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Such language is repeated in various multilateral treaties to which the United States is a party, including the International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment art. 10-13, Dec. 14, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. The key concept in international law interpretations of these concepts is respect for human dignity. *See* Basic Principles for the Treatment of Prisoners, 15 G.A. Res. 45/111, annex ¶ 5, U.N. Doc. A/45/111 (Dec. 14, 1990); ICCPR, *supra*, art. 10 ¶ 1.

II. Numerous Jurisdictions Have Adopted Policies Similar to the ABA Standard.

As demonstrated by the implementation of similar statutes in jurisdictions throughout the country, ABA Standard 23-7.9(d) strikes an effective balance between a detainee's rights and prison security concerns. There is no evidence that prisons in those jurisdictions incur greater problems associated with contraband than do prisons in other jurisdictions.

Some of these statutes bar strip searches of detainees arrested for minor offenses not involving drugs or violence, unless there is some reason for individualized suspicion of possession of a weapon or other contraband. *See, e.g.*, Cal. Penal Code § 4030(f) ("No person arrested and held in custody on a misdemeanor or infraction offense, except those involving weapons, controlled substances or violence . . . shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population, unless a peace officer has determined there is reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband."); 725 Ill. Comp. Stat. Ann. 5/103-1(c) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance.").[13]

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[13] *See also, e.g.*, Fla. Stat. 901.211(2) ("No person arrested for a traffic, regulatory, or misdemeanor offense, except in a case

In addition, the federal Bureau of Prisons, as well as a number of states, do not distinguish between detainees arrested for offenses involving violence or drugs and other detainees, but instead require individualized suspicion whenever a minor offense is involved. *See, e.g.*, Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5140.38, *supra* note 7; Conn. Gen. Stat. 54-33*l*(a) ("No person arrested for a motor vehicle violation or a misdemeanor shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or contraband.").[14]

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which is violent in nature, which involves a weapon, or which involves a controlled substance, shall be strip searched unless . . . [t]here is probable cause to believe that the individual is concealing a weapon, a controlled substance, or stolen property; or . . . [a] judge at first appearance has found that the person arrested cannot be released either on recognizance or bond and therefore shall be incarcerated in the county jail."); Tenn. Code Ann. 40-7-119(b) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or other contraband."); Va. Code Ann. § 19.2-59.1 ("No person in custodial arrest for a traffic infraction, Class 3 or Class 4 misdemeanor, or a violation of a city, county, or town ordinance, which is punishable by no more than thirty days in jail shall be strip searched unless there is reasonable cause to believe on the part of a law-enforcement officer authorizing the search that the individual is concealing a weapon.").

[14] *See also, e.g.*, Colo. Rev. Stat. § 16-3-405(1) ("No person arrested for a traffic or a petty offense shall be strip searched, prior to arraignment, unless there is reasonable belief that the individual is concealing a weapon or a controlled substance or that the individual, upon identification, is a parolee or an offender serving a sentence in any correctional facility in the state or that the individual is arrested for driving while under

Finally, other jurisdictions require individualized suspicion to strip search detainees arrested for *any* crime, regardless not only of whether violence or drugs are involved but also of whether the offense is a minor one. *See* Ohio Rev. Code Ann. § 2933.32(B)(2) ("A . . . strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon . . . that could not otherwise be discovered."); Wash. Rev. Code. Ann. § 10.79.130 ("No person to whom this section is made applicable . . . may be strip searched without a warrant unless . . . [t]here is a reasonable suspicion to believe that a strip search is necessary[.]").

The successful operation of prisons under these various statutes and the Federal Bureau of Prisons' statement demonstrates that ABA Standard 23-7.9(d) sets out a practical, workable alternative to permitting a strip search of anyone placed in a detention facility, regardless of the infraction alleged.

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the influence of drugs."); Iowa Code Ann. § 804.30 ("A person arrested for a scheduled violation or a simple misdemeanor shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband."); Mo. Stat. Ann. § 544.193(2) ("No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search . . . by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband.").

III. The ABA Standard on Strip Searches Reflects This Court's Fourth Amendment Precedents.

This Court has recently reemphasized that prisoners "retain the essence of human dignity inherent in all persons." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). Individuals do not forfeit all constitutional protections simply by reason of their admission to a prison facility. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *see also Bell*, 441 U.S. at 558; *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119, 129-30 (1977); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). The ABA Standard on strip searches reflects this Court's jurisprudence on the Fourth Amendment and on prisoners' rights more generally.

In *Bell*, this Court reiterated the overarching constitutional requirement that searches under the Fourth Amendment be reasonable. 441 U.S. at 559. To meet this requirement, searches must be reasonable both in scope and in intrusiveness under all of the relevant circumstances. *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."); *see also Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

In a specific example of this reasoning, *Bell* articulated a "test of reasonableness under the Fourth Amendment," requiring "a balancing of the need for the particular search against the invasion of

personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559 (citing numerous cases applying the "all the circumstances" inquiry in diverse contexts).

The circumstances surrounding the strip searches at issue in this case are vastly different than those at issue in *Bell*, and accordingly should require a different result. In *Bell*, this Court held that a policy requiring that detainees be strip searched after contact visits was reasonable under the circumstances. *Bell*, 441 U.S. at 560. Those circumstances included the fact that the detainees were already confined, and had the opportunity to plan ways in which to smuggle contraband into the prison facility by means of scheduled contact visits with outside parties. Even detainees charged with minor offenses may become enmeshed in smuggling schemes as a result of interactions with other prisoners once inside the facility. Further, the detainees could opt out of these intrusive searches by forgoing contact visits for more traditional visitation procedures, such as visiting in private booths separated by plexiglass.

By contrast, detainees like Mr. Florence, who are accused of minor offenses, are unlikely to have the motive or opportunity to plan to be arrested with contraband hidden on their persons for the purpose of smuggling it into a prison. Moreover, almost all such contraband can be discovered and confiscated through less intrusive means than a strip search. ABA Standard 23-7.9(d) reflects the consensus of a broad range of correctional system professionals that

automatic application of such an invasive and degrading procedure on admission to a facility is not reasonable when balanced against the likely security risks.

Further, the Fourth Amendment permits individuals to be arrested for any perceived violation of law, no matter how small. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (upholding the arrest and detention of a woman for "driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance"); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985) (fine-only misdemeanors); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984) (traffic violations); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985) (leash law violations). Were this Court to affirm the Third Circuit's decision as consistent with the Fourth Amendment, virtually any of the 14 million Americans arrested each year could be subject to a strip search upon their admission to a detention facility, even when arrested for minor infractions, including alleged offenses like Mr. Florence's that do not involve violence or drugs, and regardless of the circumstances surrounding arrest.

Finally, the Third Circuit's concern that a reasonable suspicion policy will give undue discretion to officials, thus raising "equal protection concerns," is misplaced. *See* Pet. App. 27a. Law enforcement officers have been searching people based on reasonable suspicion for over forty years—since this Court decided *Terry v. Ohio* in 1986. *See* 392 U.S. at 19. Moreover, any rule that this Court adopts will be implemented by correctional officers under written policies that provide specific guidance,

and such implementation will not be subject to the decision-making pressure that officers in the field encounter.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ATLANTIC COUNTY AND GARY MERLINE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Atlantic County is a municipality located in the State of New Jersey. The Atlantic County Correctional Facility ("ACCF") is maintained within its borders. Gary Merline is an ACCF administrator. Both *amici* Atlantic County and Mr. Merline have been named as Defendants in a pending proposed class action suit[2] in which it is alleged that ACCF conducted strip searches of non-indictable detainees pursuant to a policy violative of the *Fourth Amendment* to the United States Constitution.

This proposed class action is venued in the United States District Court for the District of New Jersey. Class action litigation based on allegedly improper inmate searches is enticing inmate action, resulting in extensive costs and time. This Court's determination as to the pending matter will affect not only the outcome of numerous pending inmate actions, one of which the *amici* are actively defending, but will also correctional facility

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the *amici curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The action is *Moore v. Atlantic County*, D.N.J., Civil No. 07-cv-05444, before the Hon. Joseph H. Rodriguez. *Moore* is presently stayed pending the decision of this Court on the appeal in *Florence*. The issue of class certification has not yet been addressed in *Moore*, which therefore remains a proposed class action.

operation throughout the State of New Jersey, and the nation as a whole.

The *amici* have a compelling interest in this case, because the issues decided directly affect their ability to safely operate and maintain their prison system. Prison officials and municipalities have the unenviable task of preserving order under difficult circumstances. See *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d 447 (1979). The decision rendered by this Court, in this matter, will affect prison operation, and policy administration, throughout both the State of New Jersey, and the nation. The prohibition of strip searches, in as broad a category as pre-trial detainees held on non-indictable offenses, severely undermines a key tool in insuring the safety of staff and inmates from the smuggling of weapons, drugs, and other harmful items into the prison system. Such a prohibition affects the health, safety and welfare of all persons who are incarcerated in, work in and visit correctional facilities.

The far reaching implication of a reversal of the Third Circuit's decision would be detrimental to the operation and safety of the entire prison system of the State of New Jersey, as well as the thousands of state, county and municipal prisons throughout the United States.

SUMMARY OF THE ARGUMENT

The *Fourth Amendment* of the United States Constitution is not violated where a detention facility implements a policy of strip searching all detainees upon admission, regardless of the pending charges, and regardless of the existence of "reasonable cause."

This Court, in *Bell v. Wolfish*, did not determine that the *Fourth Amendment* imposed a requirement for the existence of "reasonable suspicion" prior to conducting a strip search of "non-indictable" detainees upon admission to a detention facility. The holdings by certain courts, including the District Court below, that such a "reasonable suspicion" requirement had been found or imposed by the holding in *Bell v. Wolfish*, are in error.

There exists no rational basis for the distinction which has been made between the strip searching of indictable detainees as opposed to non-indictable detainees. No rational distinction can or has been made between the security and safety concerns presented by indictable detainees and those presented by non-indictable detainees.

The Third Circuit Court of Appeals correctly determined that the searches at issue in this matter were not violative of the Fourth Amendment, *Florence v. Board of Chosen Freeholders*, 621 F.3d 296 (3d Cir. 2010), and its decision should therefore be affirmed.

ARGUMENT

More than thirty years following its cornerstone decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court is poised to consider for the first time an issue which it is respectfully suggested that ten Courts of Appeal,[3] and a variety of District Courts, have wrongly decided.

In *Bell*, this Court upheld the blanket strip search/visual body cavity search policy of the federal Metropolitan Correctional Center (MCC) in New York City, which had been predicated upon "less than probable cause." 441 U.S. at 523-24. The MCC had a blanket policy of subjecting all inmates to a strip search which included a visual body cavity search, following all contact visits at the prison. *Id.* at 558. The facility housed pre-trial detainees along with convicts awaiting assignment to a prison. *Id.* at 524. The searches were conducted on every inmate

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[3] That number currently stands at eight. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom Clements v. Logan*, 455 U.S. 942 (1982); *Stewart v. County of Lubbock*, 767 F.2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); and, *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). *But see*, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); and *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*), overruling *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984).

following a contact visit, without regard to the nature or seriousness of the charges, or consideration of any other factor. *Id.* at 528. The searches were "frequently conducted in the presence of other inmates." *Id.* at 577 (Marshall, J., dissenting) This Court also noted that the visits were neither conjugal nor private in nature, and the inmates were "in full view during the visits and fully clad."

The District Court had ordered that the prison cease the anal and genital inspections, absent probable cause, but permitted the basic strip search portion of the policy to continue. *Id.* at 528-530, 558. In reversing the Second Circuit, this Court in *Bell* upheld the constitutionality of the "visual body-cavity searches" as utilized at the MCC. *Id.* at 558, 563.

In upholding the policy at issue, this Court in *Bell* looked not at whether there existed justification for such a search as to any particular individual, but whether the policy itself was "reasonable" in light of a balance between the "invasion of personal rights" entailed and the legitimate governmental interest at stake. *Id.* at 559.

Keeping in mind that the policy at issue in *Bell* was a blanket search policy, applied across-the-board to all inmates upon return from any visit, regardless of any individual circumstances, this Court held that "these searches" (*i.e.*, those occasioned by the policy under consideration) were not unreasonable:

> [A]ssuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some *Fourth Amendment* rights upon commitment to a corrections facility . . . we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, . . . and under the circumstances, we do not believe that these searches are unreasonable.

Id. at 558 (internal citations omitted).

The Court explained that "reasonableness" under the *Fourth Amendment* was not "capable of precise definition or mechanical application," but that it:

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559 (internal citations omitted).

Finally, in upholding the constitutionality of the blanket body cavity search at issue, the *Bell* Court, in language which numerous courts have accepted as directing their courses through the

ensuing three decades of legal debate, explained that:

> [W]e deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.[4]

Id. at 560. Thus, the Supreme Court in *Bell* held that a blanket strip/body cavity search policy that was reasonable, in light of the balance between a

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[4] Interestingly, at this point, the *Bell* Court noted the existence of holdings by a number of lower courts, likewise upholding the constitutionality of similar visual body-cavity search policies, including the District of New Jersey:

> When an inmate has a contact visit with a friend or relative, he is accorded complete privacy during the visit. As has been noted, the state's interest in preventing contraband from entering the prison is very strong and private contact with an individual from outside the institution presents an excellent opportunity for the introduction of all types of contraband into the prison community. The prison officials must be able to completely shut off this port of entry for contraband. To do so, an anal examination, degrading though it is, as part of the strip search, is not, in view of the state's compelling interest, an unreasonable requirement.

Hodges v. Klein, 412 F.Supp. 896, 901 (D.N.J. 1976) (Fisher, J.)

legitimate governmental interest (*i.e.*, the security interest) and the invasion of personal rights, was constitutional. *Id.*

The "balance" to which this Court looked included several factors which, in the final analysis, were resolved in favor of permitting the searches at issue. First, this Court looked to the "scope of particular intrusion," which was described as follows:

> Inmates . . . are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. . . .

Id. at 558. The scope of the intrusion at issue in *Bell* is either equivalent to or greater than the scope of the intrusion at issue in the present appeal. In *Bell*, the intrusion included the full body-cavity visual inspection, that included visual observation of genitals, lifting of the male's testicles, and the bending over and spreading of buttocks to permit visual observation. While there may be some dispute as to the extent of the intrusion in the Essex and Burlington County strip searches, there is no question but that they no greater than those at issue in *Bell*.

Second, "the manner in which it is conducted" was described as follows:

> If the inmate is a male, he must lift his genitals and bend over to spread his

> buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the *visual* search procedure.

Id. at 559. Again, as with the "scope" of the intrusion, the procedures at issue in the present appeal are similar to, though not in excess of that which was upheld in *Bell*.

Next, this Court considered "the justification for initiating it," and made the following observations:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record[5]. . . . That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part

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[5] The Court noted, however, that "petitioners proved only one instance in the MCC's short history where contraband was found during a body-cavity search, . . ." *Id.* at 557.

> of the inmates to secrete and import such items when the opportunity arises.

Id. (internal citations omitted). Again, the "justification" for the strip search policies at issue in this appeal are in accordance with those discussed in *Bell.* Respondents herein noted, in their brief to the Third Circuit, that the searches were a response to "the overriding need to maintain safety, security and health at the facility" (App.J.Brief, at 14)[6], to "discover potential weapons and controlled dangerous substances," (App.J.Brief, at 8), as well as addressing the need to identify the gang membership of incoming detainees (App.J.Brief, at 15-16 and n. 2), and the necessity to identify the presence of MRSA infection (App.J.Brief, at 16).

The final factor in this Court's strip search balancing test was "the place in which it is conducted." Neither this Court, nor the Second Circuit, explicitly noted the "place" where the searches occurred, however, the District Court, in one of its opinions, stated that:

> every inmate -- including pre-trial detainees held on charges ranging from mail embezzlement through stock fraud to narcotics dealings and bank robbery -- undergoes a strip search upon returning to his quarters from any visit.

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[6] *Amici* herein refer to the Brief of Respondents (as Appellants) to the Third Circuit Court of Appeals, as their Brief to this Court was not available during the writing of this brief.

United States ex rel. Wolfish v. Levi, 439 F.Supp. 114, 146 (S.D.N.Y. 1977). However, as noted only by the dissent in *Bell*, the searches are "frequently conducted in the presence of other inmates." *Id.* at 577 (Marshall, J., dissenting) The locus of the strip searches at issue in this appeal is not clear, although there is no indication that it falls afoul of *Bell*.

The strip searches policies, and the strip searches procedures at issue on this appeal, are not distinguishable in any meaningful way from those upheld by the Supreme Court in *Bell*. There exists no principled distinction between the MCC search upheld in *Bell*, and the searches at issue in Essex and Burlington Counties. The *difference* which lies beyond this lack of *distinction*, is found only in the superimposition of the "reasonable suspicion" requirement upon this Court's analysis in *Bell*.

Beyond the four factors considered by this Court in balancing need against intrusion, is one additional factor which was *not* at issue: the *nature or seriousness of the offenses* with which the inmate had been charged. Essential in almost every application of the "reasonable suspicion" standard in the decades since *Bell*, has been the threshold question of whether the detainees at issue have been charged with less serious offenses, offenses that do not rise to the level of a crime (*i.e.*, the *non-indictable* offenses); or with more serious or criminal offenses, (*i.e.*, *indictable* offenses or crimes). And yet, the *Bell* decision is devoid of this consideration. Thorough scrutiny of this Court's opinion in *Bell* fails to reveal *any relevance whatsoever* of the

seriousness of the offenses charged to the determination of whether the MCC's strip search policy was constitutional. This Court did find, however, that "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." *Id.* at 547, n. 28.

This Court, in *Block v. Rutherford*, 468 U.S. 576 (1984), further acknowledged this lack of distinction between pretrial detainees and sentenced convicts, but explained further:

> It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identity are substantial.

Id., 468 U.S. at 587. Likewise, the Third Circuit has acknowledged this distinction:

> In *Bell*, the Court stated that the government must be able to take steps to maintain security and that 'restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment . . . .' *Bell*

> further noted that there is no reason to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates.

Fuentes v. Wagner, 206 F.3d 335, 347 (3d Cir. 2000), quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1146 (5th Cir. 1993).

In view of the foregoing, what is perhaps most striking is that the "reasonable suspicion" requirement came to be at all.

The inquiry begins with the *Bell* Court's oft-cited and relied-upon question and answer:

> [W]e deal here with the question whether visual body-cavity inspections . . . can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

441 U.S. at 560.

Justice Powell, who concurred in part and dissented in part, became the first to seize upon this language, and provide an interpretation:

> I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

Id., at 563. Powell's few words are particularly significant for several reasons. First, he notes his *concurrence* with the majority's opinion in all respects, *except* with respect to body-cavity searches. Second, Powell specifically notes the source of his dissent, that being the failure of the majority to impose *some level of cause* with respect to the performance of body-cavity searches. Finally, Powell states that the imposition of a "level of cause" which would have resulted in his concurring entirely with the majority, would have been "reasonable cause." *Id.* As the majority in *Bell* did not impose *any* level of cause, let alone *reasonable cause*, Justice Powell dissented.

In 2008, the Eleventh Circuit Court of Appeals sitting *en banc*, reversed course, and overruled its prior determination requiring the existence of "reasonable suspicion" for the strip search of non-indictable detainees. In *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); and *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000). In

Powell, the issue which the Eleventh Circuit *en banc* considered was:

> Whether a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible. We answer that question in the affirmative, at least where the strip search is no more intrusive than the one the Supreme Court upheld in *Bell v. Wolfish*, 441 U.S. 520 ... (1979).

Powell, 541 F.3d at 1300. The Court applied the balancing test from *Bell*, and concluded that there was no justification for holding such searches constitutionally infirm, in light of the searches permitted in *Bell* by this Court:

> The reasoning that leads us to uphold the searches [in this case] is simple. After balancing the privacy interests of detention facility inmates against the important security interests involved, the Supreme Court upheld the visual body cavity strip searches at issue in the *Bell* case against a *Fourth Amendment* attack. The security needs that the Court in *Bell* found to justify strip searching an inmate re-entering

> the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time.
>
> And the searches conducted in the *Bell* case were more intrusive, and thereby impinged more on privacy interests, than those conducted in this case. It follows from the Bell decision that the less intrusive searches in this case do not violate the *Fourth Amendment*.

Id. at 1302. The strip search procedure at issue in *Powell* was set forth by the Court as follows:

> 'Every person booked into the Fulton County Jail general population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search and regardless of the crime with which the person is charged.' . . . The booking process includes 'having the arrested person go into a large room with a group of up to thirty to forty other inmates, remove all of his clothing, and place the clothing in boxes.' . . . The entire group of arrestees then takes a shower in a single large room. . . . After the group shower each arrestee 'either singly, or standing in a line with others, is

> visually inspected front and back by deputies.' . . . 'Then each man [takes] his clothes to a counter and exchange[s] his own clothes for a jail jumpsuit.'

Id. at 1301 (internal citations omitted). Clearly, the full body-cavity visual inspection permitted by the *Bell* Court is significantly more intrusive than the search at issue in *Powell*.

The Eleventh Circuit concluded that those courts, including itself, which had previously required "reasonable suspicion" as a pre-requisite for conducting strip searches of pre-trial detainees, has mis-read *Bell*:

> The *Bell* decision, correctly read, is inconsistent with the conclusion that the *Fourth Amendment* requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision is certainly inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity searches.

Powell, at 1307.

Justice Powell's *brief* dissent in *Bell* has frequently been dismissed by courts applying *Bell*, including the District Court below. Justice Powell's

first-hand, contemporaneous observation in *Bell* that the majority, with whom it is reasonable to conclude he debated the issue at some length, failed to impose any level of cause, including reasonable suspicion, has been given far too little credence. The District Court below, for example, casually dismisses Justice Powell's sharp and concise explanation of his reason for dissenting by asserting that "other reasons for the dissent are equally plausible." The Court below speculates that Justice Powell may have dissented "out of protest" to a compromise ruling or, as a result of the majority's unwillingness to decide "the particular question of reasonable suspicion [which] was not before the Court." *Florence v. Board of Chosen Freeholders*, 595 F.Supp.2d 492, 510 (D.N.J. 2009).

Justice Powell's single-paragraph dissenting opinion, however, is neither unclear about his intentions, nor does it leave room for such speculation. It is straight-forward, to the point, and unambiguous, and it should be respected for the insight which it provides into the majority's failure to positively articulate a level of "cause."

The Eleventh Circuit also found Justice Powell's meaning clear: "Justice Powell dissented for one and only one reason, which was that the Court did not require reasonable suspicion for conducting the strip searches in that case":

> From his perspective inside the Court, Justice Powell (like Justice Marshall) had a far better sense of the majority's

> decision in *Bell* than any of us lower court judges could, and he understood that the decision permitted the body cavity inspection strip searches without reasonable suspicion.

Powell, 541 F.3d at 1307-1308. As the Eleventh Circuit noted, Justice Marshall also dissented from the majority's opinion in *Bell*, on bases that included the lack of "cause" for the strip search upheld:

> Without question, these searches are an imposition of sufficient gravity to invoke the compelling-necessity standard. It is equally indisputable that they cannot meet that standard. Indeed, the procedure is so unnecessarily degrading that it 'shocks the conscience.' *Rochin v. California*, 342 U.S. 165, 172 (1952). Even in *Rochin*, the police *had reason to believe* that the petitioner had swallowed contraband. Here, the searches are employed *absent any suspicion of wrongdoing*.

Bell, 441 U.S. at 578 (Marshall, J., dissenting) (emphasis added).

The Eleventh Circuit correctly points out that had the majority in *Bell* found fault with Justice Powell's conclusion (as well as Marshall's) that no "cause" had been required for the strip search being upheld, it certainly could have addressed it in the opinion:

> Confronted with the dissenting statements, the majority, if it had not intended to permit those searches of pretrial detainees without reasonable suspicion, would have noted as much in its opinion. It would have been a simple matter to do that. The majority, however, did not change its opinion to state that reasonable suspicion was required because Justice Powell's (and Justice Marshall's) reading of its opinion was accurate. The *Bell* decision means that the *Fourth Amendment* does not require reasonable suspicion for this type of strip search in detention facilities.

Powell, 541 F.3d at 1308. Such "back-and-forth" between majority and dissent in Supreme Court opinions is common, arising from the deliberative process in which the Court's opinions are shaped[7], and can be found in the *Bell* opinion itself. Justice Rehnquist, writing for the majority, takes exception to the "claim" by Justice Stevens in his dissent that the Court's holding that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law" constituted "a departure from our prior due process cases." *Bell*,

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[7] See, *e.g.*, Maltzman, F., Spriggs, J.F. and Wahlbeck, P.J., *Crafting Law on the Supreme Court* (New York: Cambridge University Press, 2000), 6-10, *et seq.* (Selection available online at: http://catdir.loc.gov/catdir/samples/cam032/ 99047720 .pdf)

441 U.S. at 535, and n.17. Justice Rehnquist proceeds to correct what he finds to be Justice Stevens' erroneous interpretation. It is apparent that he also could have done so had he found fault with Justice Powell's point.

The Eleventh Circuit in *Powell* succinctly sets forth some of the other problems with the rationale of requiring "reasonable suspicion":

> While those decisions vary in detail around the edges, the picture they pain is essentially the same. The arrestee is charges with committing a misdemeanor or some other lesser violation and, while being booked into the detention facility, she is subjected to a strip search pursuant to the facility's policy. She later sues the officials asserting that the search was unconstitutional because the guards did not have any reasonable basis for believing that she was hiding contraband on her person. *See, e.g., Mary Beth G.* 723 F.2d at 1266. In each cited case, the court of appeals concludes that because the plaintiffs were 'minor offenders who were not inherently dangerous,' *id.* at 1272, detention officials could conduct a strip search only where there was 'a reasonable suspicion that the individual arrestee is carrying or concealing contraband,' *Giles*, 746 F.2d at 617. In

> each of the cases where reasonable suspicion was lacking, the search is held to violate the Fourth Amendment.
>
> Those decisions are wrong. The differences between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all '[i]nmates at all Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.' *Bell* 441 U.S. at 558 ... It was a blanket policy applicable to all.

541 F.3d at 1309-1310. Indeed, contrary to the implication of the Seventh Circuit in *Mary Beth G.*, that the detainees in *Bell* did *not* include those being held on lesser or non-indictable charges - "the detainees were awaiting trial on serious federal

charges," 723 F.3d 1263, 1272 (7th Cir. 1983) - the MCC actually housed detainees on a variety of charges:

> Among the '[i]nmates at all Bureau of Prison facilities, including the MCC,' were detainees facing only lesser charges, people incarcerated for contempt of court, and witnesses in protective custody who had not been accused of doing anything wrong. See [*Bell*] at 524 & n.3, 558, 99 S.Ct. at 1866 & n.3, 1884. The MCC was hardly a facility where all of the detainees were 'awaiting trial on serious federal charges,' as some of the opinions incorrectly state. *See, e.g., Mary Beth G.*, 723 F.2d at 1272.

541 F.2d at 1310.

Although this Court has not directly addressed the issue of the improvidently applied "reasonable suspicion" requirement, as it has come to be imposed by the lower courts in the post-*Bell* period, the issue has resulted in at least some critique from members of this Court. In 1981, in his capacity as Circuit Justice, Justice Rehnquist temporarily stayed the decision of the Fourth Circuit Court of Appeals in *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom Clemens v. Logan*, 455 U.S. 942 (1982), finding it to be "so at odds" with *Bell* that the full Court should have the opportunity to consider:

In my view, the decision of the Court of Appeals is so at odds with this Court's resolution of a similar issue in *Bell v. Wolfish*, *supra*, that its mandate ought to be stayed temporarily pending consideration by the full Court. *Bell v. Wolfish* was a class action initiated by inmates of a federally operated short-term detention facility challenging the constitutionality of numerous conditions of confinement and related administrative practices. The facility was primarily used to house persons charged with a crime but not yet brought to trial. One of the challenged practices was the requirement that inmates submit to a strip search and visual inspection of their body cavities after every contact visit with someone from outside the institution. This Court ultimately held that under the circumstances, such searches were not unreasonable under the *Fourth Amendment*, 441 U.S., at 558-560. Rather, they were 'reasonable responses . . . to legitimate security concerns,' *id.*, at 561, and could be conducted in the absence of probable cause, *id.*, at 560.

The Court of Appeals recited from *Bell v. Wolfish* the general standard by which searches are judged under the *Fourth Amendment*, but it chose to ignore the Court's application of that

> standard to the practice of conducting strip-searches of persons detained after being charged with a crime. Respondent in this case was arrested and charged by a Magistrate with driving while intoxicated and unlawful refusal to submit to a breath-analysis examination. The Magistrate authorized her release from the Detention Center only when a responsible individual arrived to take custody. Until that time, respondent remained officially under arrest and subject to those measured adopted for the maintenance of internal security at the jail. Her position was no difference, for constitutional purposes, from the pretrial detainees in *Bell v. Wolfish*. If anything, the detainees in that case were subject to more onerous conditions, given the greater intrusiveness of a body-cavity search. The Court nevertheless upheld such searches 'in light of the central objective or prison administration, safeguarding institutional security.' *Id.*, at 547.

Clements v. Logan, 454 U.S. 1304, 1309-1310, vacated, 454 U.S. 1117 (1981).

In more-recent commentary, Justice Scalia, writing for the majority in *Veronica School District 47J v. Acton*, 515 U.S. 646 (1995), considered whether a blanket policy requiring that all student

athletes undergo drug testing, was constitutional. In holding that the school district's drug testing policy comported with the *Fourth Amendment*, the Court rejected the suggestion that individualized "suspicion" of drug use by a student was required prior to testing, in order to meet constitutional requirements:

> In many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse. . . .
>
> There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the *Fourth Amendment* status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the 'categorical protection' of a 'strong preference for an individualized suspicion requirement,' *post*, at 681. The case on which it relies for that proposition, *Bell v. Wolfish*, 441 U.S. 520, 60 L.Ed.2d 447, 99 S.Ct. 1861 (1979), displays no stronger preference for individualized suspicion than we do today.

515 U.S. at 664, and n.3 (emphasis added).

The super-imposition of the "reasonable suspicion" requirement upon the holding in *Bell* has not gone unnoticed, as Judge Tallman originally explained in his dissent in *Bull v. City and County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), two

years prior to the Court's *en banc* decision in that same case:

> Our ship has sailed far from the course charted by the United States Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 ... (1979). ... As the empirical evidence from jail operations now shows, the underlying rationale for Ninth Circuit decisions in this arena suffers from an inherent defect in basic logic. The assumption is that arrestees booked for only minor or nonviolent offenses who will not be promptly released and must be housed with the general inmate population are unlikely to be carrying concealed contraband or dangerous weapons. Experience teaches otherwise. . . .
>
> [T]he majority extends Ninth Circuit restrictions and adopts a per se rul requiring reasonable suspicion to strip search a pretrial detainee transferred into the general population for housing who does not otherwise meet the category of arrestees the majority approves for strip-searching.. But the newly-minted rule runs contrary to Supreme Court precedent, impedes jail administration, and further endangers the safety of jail inmates and employees. Because I would conclude that San Francisco's policy of strip

> searching every arrestee transferred into its general jail population for housing is reasonable under the *Fourth Amendment*, I would find no constitutional violation from the strip search policy. . . .
>
> Never has the Supreme Court required reasonable suspicion of weapons or contraband to justify a strip search of pretrial detainees bound for the general prison population.

539 F.3d at 1205-1206, 1208-1209 (Tallman, J., dissenting).

Judge Tallman's prescient dissent from the Ninth Circuit's panel decision in *Bull*, and Judge Ikuta's "reluctant" concurrence - in which she urged that "a reconsideration of our case law is urgently needed" (*Bull*, 539 F.3d at 1025) - was followed by the Court's grant of rehearing *en banc*, 558 F.3d 887 (9th Cir. 2009), and eventual reversal, *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010).

Judge Ikuta, writing for the majority, explained its reversal of the requirement of reasonable or individualized suspicion, as found in *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and in *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984):

> *Thompson* and *Giles* failed to comply with the Supreme Court's direction that

> we not substitute our judgment for that of corrections facility officials. *Bell*, 442 U.S. at 540 n.23.
>
> [O]ur conclusion in *Giles* that strip searches of arrestees heading into the general jail population must be based on individualized suspicion is inconsistent with the approach adopted in *Bell*. The Supreme Court did not require MCC officials to consider the individual characteristics of the persons subject to the strip search policy. Nor did the Court require MCC officials to articulate their suspicions that a particular person subject to the policy was smuggling contraband. Rather, the Supreme court upheld a policy of strip searching all persons who had contact visits as categorically reasonable under the circumstances in the detention facility.

595 F.3d at 978, citing *Bell*, 441 U.S. at 559-60; and *Hudson v. Palmer*, 468 U.S. 517, 534 (1984) (O'Connor, J., concurring). The Ninth Circuit noted that the question of whether individualized suspicion is required was "squarely raised in *Bell*" via Justice Powell's dissent "on the sole ground that 'at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case.'" 595 F.3d at 978, quoting *Bell*, 441 U.S. at 563. Nevertheless, "the [*Bell*] Court declined to impose an

individualized suspicion requirement," despite the critique provided by the dissent. *Id.*

The Court explained that its decision in *Giles* was in error on several additional bases, commonly relied upon by circuits which have embraced the requirement of reasonable suspicion:

> [W]e erred in concluding that arrestees charged with minor offenses 'pose no security threat to the facility.' *Giles*, 746 F.2d at 618. *Bell* did not require MCC officials to modify the strip search policy based on whether a detainee had been charged with a serious or minor offense. Indeed, the detention facility in *Bell* housed witnesses in protective custody and persons detained pursuant to contempt orders, and those persons were included in the class of plaintiffs.[8]
>
> . . .
>
> . . . *Giles* erred in assuming that a strip search policy could not have a deterrent effect on persons who have been arrested and are being introduced into the general population for the first

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[8] The class definition in *Bell* included "pre-trial detainees for whom the facility was primarily designed, sentenced prisoners either awaiting assignment to a prison facility or assigned here to serve their (usually relatively short) terms, prisoners here on writs to testify or to stand trial, witnesses in protective custody, and persons incarcerated for contempt." 595 F.3d at 978-79, quoting *United States ex rel Wolfish v. Levi*, 439 F.Supp. 114, 119 (S.D.N.Y. 1977).

> time, ... as opposed to detainees who are already in the general jail population and are engaging in contact visits. In both scenarios, the individuals have access to contraband and can conceal dangerous items on their person.

595 F.3d at 978-79. The Ninth Circuit then set forth, and rejected, a number of bases upon which the circuits have mis-read *Bell*:

> [W]e disagree with those other circuits that have held strip searches of arrestees entering the general jail population per se unreasonable unless the officials have individualized reasonable suspicion that the arrestees are smuggling contraband. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001); *Shain* [*v. Ellison*], 273 F.3d [56] at 65 [(2d Cir. 2001)]; *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989). These courts have purported to distinguish *Bell* on several grounds: that persons arrested on certain minor offenses do not represent a security concern, *see, e.g.*, *Roberts*, 239 F.3d at 111, *Masters*, 872 F.2d at 1255; that persons who are arrested are less likely to smuggle contraband than detainees already in the general jail population who engage in contact visits, *see, e.g.*, *Roberts*, 230 F.3d at

> 112; and that a blanket strip search policy for all arrestees entering the general jail population is unreasonable unless officials have demonstrated the existence of a significant smuggling problem and that a blanket policy has a significant deterrent effect, *see, e.g., id.*
>
> As explained above, this reasoning is inconsistent with both the general principles enunciated in *Bell* and *Turner*, and with the specific application of those principles to the strip search at issue in *Bell*. Moreover, those decisions are inconsistent with the Supreme Court's warning that federal courts must avoid substituting their judgment for the 'professional expertise of corrections officials' in 'determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion.' 441 U.S. at 540 n.23.

595 F.3d at 980. The Court concluded that "[w]e therefore override our own panel opinions in *Thompson* and *Giles*. *Id.* at 981.

When the Third Circuit rendered the decision *sub judice*, it became the third Court of Appeals to reject a thirty-year history of mistakenly reading *Bell*. A clear, though shifting dichotomy in opinion

as to this reading of *Bell* has developed, and has resulted in this Court's grant of *certiorari* to resolve this split.

The Third Circuit in *Florence*, correctly homed in on each of the major factors which, since 2008, served to convince both the Eleventh and Ninth Circuits to upend their own longstanding precedents, and reject the "reasonable suspicion" requirement. The Court appropriately concluded that the balancing of interests under the Fourth Amendment -- requiring that it balance "the need for the particular search against the invasion of personal rights that the search entails," 621 F.3d at 301, quoting *Bell*, 441 U.S. at 559 -- clearly tilted in favor of "the Jails' security interests at the time of intake before arrestees enter the general population [and] against the privacy interests of the inmates." *Id.* at 311.

The Court in *Florence* agreed that the Circuits which previously concluded that reasonable suspicion was required "failed to give appropriate deference to the judgments of prison administrators, and ignored the fact that in upholding visual body-cavity searches, the Supreme Court in *Bell* neither required individualized suspicion of smuggling nor differentiated the degree of suspicion required based on the type of offender." 621 F.3d at 305, citing *Powell*, 541 F.3d at 1307-11. As with the contact visits at issue in *Bell*, the security concerns raised by an inmate's "initial entry into a detention facility" -- likened in *Powell* to having followed "one big and prolonged contact visit with the outside world" --

are equally grave. 621 F.3d at 305, quoting *Powell*, 541 F.3d at 1313.

The Third Circuit concluded, in agreement with the Ninth and Eleventh Circuits, that "the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*." 621 F.3d at 308. The Court rejected the assertion that blanket searches were unreasonable because the jails had "little interest in strip searching arrestees charged with non-indictable offenses." *Id.* The Third Circuit noted that in *Bell*, this Court "explicitly rejected any distinction in security risk based on the reason for detention." *Id.* This Court held that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." *Bell*, 441 U.S. at 546 n.28. "It is self-evident," the Third Circuit explained, "that preventing the introduction of weapons and drugs into the prison environment is a legitimate interest of concern for prison administrators," 621 F.3d at 307. Prison officials "must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." *Bell*, 441 U.S. at 540.

The Petitioners have urged rejection of the jails' security interest argument, absent "evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband." 621 F.3d at 309. The Third Circuit rejected the argument, finding that the decision in

Bell does not require that such evidence be produced. *Id.*

The contrary is exemplified in *Bell*, as the Third Circuit discussed:

> In *Bell*, the single instance of attempted smuggling did not undermine the MCC's justification for the search. Quite to the contrary, the Court considered the absence of a record to be evidence of the policy's successful deterrent effect. *Bell*, 441 U.S. at 559. Likewise here, strip searches at the time of intake also have significant deterrent value. If non-indictable offenders were not subject to automatic search it would create a security gap which offenders could exploit with relative ease.

Florence, 621 F.3d at 309.

With respect to the Atlantic County Correctional Facility, the county facility at issue in *Moore*, as in the case of virtually any other high-volume detention facility nationwide, examples of the efforts by incoming, pre-trial detainees, to smuggle contraband, including drugs and weapons, are not hard to come by. During a 19-month period, ending November 30, 2009, a total of 34 detainees, being held on non-indictable charges, either attempted to or succeeded in smuggling contraband, including drugs and weapons, into the secured perimeter of the facility. *Amici* App. 1a.

Examples include a detainee arrested and brought into the facility on a non-indictable charge, who was found to have secreted a loaded Pietro Baretta 380 automatic pistol under his groin area. *Id.* at 2a-10a. This detainee had been arrested pursuant to a warrant on a charge of contempt of court, and was subject to a fairly low bail. *Id.*

A second example involves a detainee who turned himself in to the facility, to serve a 10-day sentence for driving while suspended. *Id.* at 11a-14a. Although the inmate in this example was already sentenced, and thus did not fall within the category of pretrial detainee as to whom the "reasonable suspicion" requirement as developed would have been applicable, the inmate's account of the circumstances is highly informative. Unknown to the inmate when he surrendered, as he was already sentenced, he was subject to a strip search. *Id.* at 11a-14a. The search revealed a package of items duct-taped to the underside of the inmate's scrotum, which included "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills and a striker." *Id.* at 13a.

Investigation of the incident revealed that the inmate had been under the misapprehension that he *would not* be strip searched "due to the fact that he wasn't strip searched the last time he was incarcerated." *Id.* at 15a. The inmate told officers that "the last time he came into the jail ... the searching Ofc did a behind the screen search [and] that he assumed he would be searched the same way and would be able to get away with taping the

contraband to himself to get it into the facility." *Id.* at 22a.

This example highlights the very real danger of detainees "gaming" a system that provides them with the foreknowledge of a class of persons who will be subjected to lesser security requirements, and creates the very "security gap" of which the Third Circuit warned in *Florence*. This "security gap" was not anticipated nor required by this Court when it rendered its decision in *Bell*. Its imposition in the form of the "reasonable suspicion" standard should be ended, and the clear dictates of *Bell* reaffirmed.

CONCLUSION

From Justice Powell to Justice Scalia, as well as those jurists who have taken on the deviation in course from the Court's holding in *Bell v. Wolfish*, it is apparent that a course correction in the jurisprudence relating to pre-trial detainee search policy is required.

More than thirty years ago, the United States Supreme Court, in *Bell v. Wolfish*, held as constitutional a blanket strip search policy which required that all inmates in the New York City prison system to undergo a full visual body-cavity search following every contact visit - regardless of any inquiry into the individual inmate, into the inmate's individual dangerousness, into the charges upon which the inmate was being held, or into any aspect pertinent to an assessment of whether any individual inmate might be secreting drugs, weapons

or other contraband upon or within his or her person.

The caselaw which has developed following *Bell*, and which has imposed a requirement of "reasonable suspicion" for the strip search of pretrial detainees held on lesser or non-indictable charges, finds no support in this Court's decision in *Bell*, is clearly in error, and should be rejected.

Accordingly, *Amici Curiae*, Atlantic County and Gary Merline, respectfully request that the decision of the Third Circuit in *Florence* be affirmed.

Respectfully submitted,
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[ATLANTIC COUNTY LETTERHEAD]

INTER-OFFICE MEMO

Date: 12/02/09
To: Warden S. Thomas
From: Lt. J. Giberson, Operations
RE: Non-Indictable Cases

The total number of inmates committed to the Atlantic County Justice Facility from May 01, 2008 though November 30, 2009 was 17554. Out of those numbers there were 31 incident reports filed during this time involving 34 inmates that either attempted to, or brought some type of contraband; e.g. drugs, tobacco, weapons, etc; into the secured perimeter of the facility. All of these inmates were committed on Non-Indictable charges.

The "Most" serious of these offenses was committed on June 25, 2009 Report # 09060518, when inmate [redacted] was committed by one of the local Police Departments. [redacted] was wanted for an ACS warrant out of Galloway Twp Municipal Court with a bail of $1553.00 full cash. While pat searching [redacted] inside the Admissions processing area, staff found a loaded Beretta Pietro Model 85F 380 caliber automatic pistol under his groin with four rounds in the magazine and one in the chamber. The pistol was removed from the inmate by staff without incident. A photo of the weapon seized it attached.

[ORIGINAL FORM DATA OMITTED]

On the above date and time this writer was assigned as the shift #1 commander. While on duty I was contacted by Sgt. D'ambrosio who was assigned as the admissions Sergeant. Sgt. D'ambrosio advised me that a hand gun was just found on a new commitment while being pat searched. I immediately responded to the area to secure the weapon.

Upon entering admissions I proceeded directly to the processing area. While in the admissions processing area I proceeded to secure the weapon from Officer Pereira and remove it from the confines of the institution. The hand gun was identified as a Pietro Beretta 380 Auto Cal.9 Short, model 85F. The serial number was identified as F13063Y. The hand gun along with the magazine and five rounds of ammunition were secured in and evidence bag and the chain of custody was completed. The evidence bag containing the weapon was then secured in the evidence locker inside the armory.

Once the weapon was secure I proceeded to speak with Officer Pereira about the incident. Officer Pereira stated that while working admissions Pleasantville Police Department (Officer Mark Porter) dropped off a new commitment. The commitment identified [redacted] (175990) was brought in on a contempt of court charge. The charge was out of Galloway Township Municipal Court (S20080002860111) in the amount of $1,553.00 Full

by order of Judge Roseanne Lugg (see attached).

After finishing the processing at the booking window, inmate [redacted] into admissions. While in admissions Officer Pereira ordered inmate [redacted] to the booking counter. Inmate [redacted], who was handcuffed in front and still in restraints placed his hands on the counter and Officer Pereira completed the pat search. While conducting the pat search he felt a hard object located under inmate [redacted] groin area. Initially no being able to identify the object Officer Pereira questioned inmate [redacted] about the object. Inmate [redacted] would not respond to the question. Officer Pereira again asked inmate [redacted] what the object is that he was concealing. Inmate [redacted] again refused to respond to the question. While continuing with the search Officer Pereira was able to identify the object as a handgun.

Officer Pereira immediately knocked on the admissions window alerting Sgt D'ambrosio to respond to the admissions booking area. Upon entering the area Sgt. D'ambrosio witnessed Officer Pereira remove the handgun from inmate [redacted] pants. The Handgun Was loaded with the magazine and a round was in the chamber. Officer Pereira pointed the weapon in a safe direction and cleared it for the safety of the officers as well as others.

After removing the weapon inmate [redacted] stated that the police would not give him a phone call and that's why he did not tell them about the

gun. Inmate [redacted] was then escorted into the admissions bathroom by Officer Pereira and Officer Parisi where probable cause dictates he could now be strip searched. During the strip search no other contraband was found. After completion of the strip search inmate [redacted] was placed in full restraints and placed in cell #41 without further incident. Inmate [redacted] will remain housed in admissions for further investigation and upon clearance by the classifications unit. Inmate [redacted] will be charged with a *.201 Possession or introduction of an explosive, incendiary device or any ammunition and a *.202 Possession or introduction of a weapon, such as but not limited to, sharpened instrument, knife or unauthorized tool. Reports were obtained from staff involved and a watch log was completed (see attached). A copy of report was also forwarded to warden for his review.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time while working in Admissions Pleasantville Police Department brought in new commitment [redacted] on a contempt of court charge out of Galloway Township. After I/M [redacted] was finished being processed at the booking window I/M [redacted] entered into Admissions. This writer had ordered I/M [redacted] to the booking counter and began pat searching I/M [redacted] while still in restraints. When pat searching the area under the groin, between the legs this writer felt a hard object. This writer then questioned I/M [redacted] as to what was there, I/M [redacted] did not respond. This writer then asked again as to what the object was, I/M [redacted] again did not respond. This writer then confirmed that he had a weapon, a Beretta Pietro Model 85F caliber 380 auto. This writer then knocked on the Sergeant's office window to notify Sgt. D'Ambrosio while securing I/M [redacted] at the booking counter. This writer advised Sgt. D'Ambrosio that I/M [redacted] had a weapon under the groin area. This writer then removed the weapon and then cleared the weapon for the officer's safety as well as others. I/M [redacted] then stated that the Police would not give him a phone call that's why he didn't tell them about the gun. This writer then had probable cause to strip search I/M [redacted] for any other weapons and/or contraband. This writer and along with Ofc. Parisi escorted I/M [redacted] into Admissions bathroom

for a full strip search. After completing the strip search I/M [redacted] was then placed into full restraints and placed into cell 41 with no further incident. This writer will be charging I/M [redacted] with *.201 Possession or introduction of an explosive, incendiary device or any ammunition and *.202 Possession or introduction of a weapon, such as but not limited to, sharpened instrument, knife or unauthorized tool. END REPORT

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time this writer assigned to Adms #3 was assisting 16-3 Sgt. D'Ambrosio with pulling property for numerous releases left from Shift #3. Officer Pereira Adms#2 was patting down New Commitment that Pleasantville P.D. had brought in and he then knocked on the Sgt's office window. Officer Pereira then motioned for Sgt. D'Ambrosio and myself to come out to the booking window. Officer Pereira stated that he felt a weapon in the underwear of said individual [redacted]. Officer Pereira then took out a loaded gun from inside [redacted] underpants that he had hidden between his legs and private area. The weapon was unloaded by Officer Pereira placed into an evidence bag and turned over to Lt. Zimmerman 17-1. Inmate [redacted] stated that the Police would not give him a phone call that's why he didn't tell them about gun. After the weapon was taken out of the area this writer and Officer Pereira took inmate [redacted] in the bathroom to Conduct a Full strip search and change him into Oranges. Inmate [redacted] was then placed in Full Restraints per Lt. Zimmerman and placed into Cell #41 and watch Log started on inmate [redacted].

[ORIGINAL FORM DATA OMITTED]

Body of Report

While working in Admissions as 16-3, I was motioned by Officer Pereira to come to the Admissions booking desk. Officer Pereira then showed me that Inmate [redacted] #175990 had a handgun between his legs. I watched as Officer Pereira removed the weapon. and secured it. I then notified Lt. Zimmerman who responded to Admissions. Lt. Zimmerman then took over the investigation of the incident.

CMM1106 COPY OF WARRANT

WARRANT NO: S 2008 000286
MUN: 0111
DATE WARRANT ISSUED: 06 03 2009
BAIL AMOUNT: 1,553.00 BAIL TYPE: FL
BAIL WAIVER AUTHORIZED: N
OFFENSE: 2C:35-10A(4)

TO ANY POLICE OFFICER:
YOU ARE HEREBY COMMANDED TO ARREST THE DEFENDANT WHOSE NAME AND ADDRESS ARE SHOWN BELOW AND BRING HIM BEFORE THIS COURT TO ANSWER A COMPLAINT CHARGING AN OFFENSE IN TH8 ,JURISDICTION OF THIS COURT OR HOLD THE DEFENDANT TO BAIL BEFORE AN AUTHORIZED OFFICIAL IF AN AMOUNT OF BAIL IS SHOWN ABOVE.

BY ORDER OF THE JUDGE
CHRISTOPHER A BROWN
GALLOWAY TOWNSHIP MUNICIPAL COURT
300 EAST JIM LEEDS ROAD
GALLOWAY NJ 08205-0000
AUTHORIZED BY
ROSEANNE LUGG

[redacted]
PLEASANTVILLE NJ 08232-0000
DLN: SBI: [redacted] SSN: [redacted]
DOB: [redacted] RACE: B SEX: M
EYES: 2 HAIR: WHT: HGT:

SCARS/MARKS/DESC:
FULL BAIL AMOUNT - NO 10%
PF1-EXC WARRANT-LAW ENF PF2-WARNT HIST
PF3-EXECUTE/SUPRCD PF4-COPY BAIL WAIVER

[handwritten:]
09-27101 @23:23
Executed 6/24/09 @2345 SR705

[DATE STAMP]
2009 jun 25 am 12:22
ADMISSIONS

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time while assigned to 16-3, I was returning from gathering property from the property room and entering admissions. Once I entered, Ofc. Decicco (who was exiting the search room) stated to me that inmate [redacted] was not cooperating with a strip search being conducted on him by Ofc. Barreto. I looked in the search area and saw Ofc. Barreto who stated that inmate [redacted] had duct tape under his scrotum and was not willing to remove it. Ofc. Barreto stated that inmate [redacted] was sentenced to 10 days for driving while suspended. I identified inmate [redacted] and ordered him to lift his scrotum. Inmate [redacted] did so. I saw that there was duct tape underneath his scrotum. Inmate [redacted] stated that he had a boil and the tape could not be removed. Ofc. Barreto stated to the inmate that medical would be called to treat him if he would cooperate and remove the duct tape. Inmate continued to resist the order.

I instructed Ofc. Barreto to place inmate [redacted] in full restraints and place him in a cell. Ofc. Decicco searched cell #40 for contraband (finding none) Inmate [redacted] was placed in a county issued uniform, secured in leg irons and belly chains and placed in cell #40.

I contacted Lt. Gaunt and advised him of the situation. Based on our conversation, we decided

that it would be best to handcuff inmate [redacted] in the back. I returned to admissions where Ofc. Barreto and myself removed his belly chains and handcuffed him behind his back. Afterward Ofc. Barreto and myself brought the charge nurse into cell #40 to check inmate [redacted] restraints for proper blood flow. Ofc. Barreto and I saw on the floor of the cell multiple matches (loose). The charge nurse was dismissed. I instructed Ofc. Barreto to remain with inmate [redacted] while I went to center control to get the video camera and tape #v09-147. To video any other evidence that might evolve. I returned back to admissions cell #40. Upon returning, Ofc. Barreto stated that he recovered from inmate [redacted] pant leg a plastic bag with 5 red pills in it a small bag with a green leafy substance. I began to run the video camera due to the fact that Ofc. Barreto had already found evidence. Ofc. Barreto began to pat search inmate once again. I asked inmate what his name was, He refused to answer. It appeared that inmate [redacted] had put something into his mouth and was refusing to open it (It appeared that inmate [redacted] placed something in his mouth while in belly chains). I ordered inmate [redacted] to open his mouth. I then asked if he was refusing to open his mouth for a search. He nodded his head confirming that he was refusing. Lt Gaunt arrived told inmate [redacted] of the repercussions he would face if he did not comply with the search and ordered inmate [redacted] to open his mouth. After contemplating the repercussions for a few moments, inmate [redacted] spit out of his mouth into Ofc. Barreto's

hand, green leafy substance. Based on my training and experience, I conclude that the green leafy substance to be marijuana. Ofc. Barreto also found during the pat search, while in the cell, rolling papers. Inmate was escorted to the search room and strip searched again. The duct tape was then discovered. The strip search also revealed that inmate [redacted] did not have a boil. I ended the tape after the search was completed and secured inmate [redacted] in cell #34 (previously searched). All evidence was gathered and secured by Officer Barreto. Lt Gaunt asked inmate if he swallowed any of the green substance. Inmate [redacted] answered no.

I checked with Sgt Illiucci and nurse Marin for the identity Of the pills. They were identified as either Elavil or motrin. They were not scheduled I, II or III drugs. A copy of the pill identifier and nurses report attached.

Due to the work load of the day I couldn't interview inmate [redacted] until 1600 hrs. I instructed Ofc. Teeney to escort inmate [redacted] to the first floor office. There, inmate [redacted] was issued his Miranda Warnings witnessed by Officer Teeney and signed by all. When asked, Inmate [redacted] identified the contraband which he had on him as "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills and a striker". He stated that he was going to take the pills himself to sleep during his time while incarcerated and use the weed to trade for food with other

inmates. When asked, inmate [redacted] stated that he [redacted] was incarcerated on 10-24-09. The officer searching him, had him stand behind a curtain. Due to this fact inmate [redacted] stated that he thought he would be searched the same way and would get away with taping the contraband to himself to get it into the facility. I ended the interview and inmate [redacted] was escorted back to admissions by Officer Teeney to be transferred to DR.

Conclusion:

Inmate [redacted] had turned himself in as part of his 10 day sentence for driving wile suspended. Due to the fact that inmate [redacted] was sentenced, Ofc. Barreto was authorized to strip search him. During this strip search duct tape was seen attached to inmate [redacted] under his scrotum. When ordered to remove the tape, inmate [redacted] refused to remove it. Inmate [redacted] was then placed in full restraints and housed in admissions cell #40. During this time, inmate [redacted] had removed the tape and placed some of the "weed" in his mouth. Matches and other contraband was found in the previously searched cell upon staff arriving back to the cell. Inmate [redacted] refused to comply with orders to open his mouth. Upon other orders to open his mouth, inmate [redacted] spit out the green leafy substance in Ofc. Barreto's hand. Inmate [redacted] was issued his Miranda Warnings and agreed to speak with me. During the interview inmate [redacted] identified

the contraband that was removed as his. He stated that he brought the pills in to sleep for himself and the "weed" to use as trade. This was done intentionally and with forethought due to the fact that he wasn't strip searched last time he was incarcerated. He admitted that due to this fact, taping the contraband to his body would be easy to bring into the facility. Inmate [redacted] will be institutionally charged with *.708 refusal to submit to a search, .256 refusing to obey an order of any staff member, *.203 possession or introduction of any prohibited substance and .554 possession of tobacco products or matches. All evidence was secured in the center control and the chain of evidence followed. The video tape was reviewed for contents by myself and Lt. Gaunt. Inmate [redacted] was transferred to DR and placed on high security status. Criminal charges will be addressed by our Professional Development Unit.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and approximate time as assigned to Admissions 1. [redacted] was in the front lobby turning himself in on a ten day sentence, per Records. This writer reviewed the commitment paper work and escorted [redacted] around to Admissions. Once in the Admissions sally port this writer pat frisked [redacted] no contraband was found on his person.

[redacted] then came into Admissions were Ofc. Barreto started inventorying his (Inmate [redacted]), property. Ofc. Baretto then escorted Inmate [redacted] into the Admissions bathroom, this writer advised Ofc. Baretto that Inmate [redacted] came in on a ten day sentence for driving while suspended and is a full strip search.

About approximately four minutes later this writer heard Ofc, Baretto yell out the bathroom, "DeCicco go get 16-3 this inmate is giving me a problem". This writer went into the Admissions bathroom, and at the same time Sgt. Nilson was walking by from getting property out of the garage. This writer and Sgt. Nilson went into the Admissions bathroom where Ofc. Baretto was ordering Inmate [redacted] to remove the duct tape from around the bottom of his testicles. Inmate [redacted] was refusing the order given and stated it was a boil that he had covered up. Sgt. Nilson then

ordered Inmate [redacted] to remove the duct tape. Inmate [redacted] still refused to remove the tape. Sgt. Nilson then ordered Inmate [redacted] to put the oranges on, in which Inmate [redacted] complied.

Sgt. Nilson ordered this writer and Ofc. Baretto to place full restraints on Inmate [redacted] and place him into a empty searched cell. This writer and Ofc. Baretto placed Inmate [redacted] into full restraints which were adjusted and double locked. This writer and Ofc. Baretto escorted Inmate [redacted] out of the Admissions bathroom and over to cell 0040. This writer searched cell 0040 before Inmate [redacted] went into that cell, no contraband was found in cell 0040. Sgt. Nilson then had Ofc. Baretto take Inmate [redacted] out of the belly chains and had him place handcuffs on Inmate [redacted] behind his back.

At approximately ten minutes later this writer assisted Ofc. Baretto in strip searching Inmate [redacted] in the Admissions bathroom while Sgt. Nilson video taped the search. Duct tape and white rolling papers fell to the floor during the search, which was picked up off the floor and put into the evidence bag with the other contraband Ofc. Baretto had found on Inmate [redacted] before he was escorted out of cell 0040, and then over to the Admissions bathroom to be searched.

No other contraband was found on Inmate [redacted] and he was then escorted out of the Admissions bathroom, sat in the boss chair, and

wand for any other contraband, none was found. Cell 0034 was searched for contraband and none was found. Inmate [redacted] was then placed into cell 0034 without incident.

[ORIGINAL FORM DATA OMITTED]

Body of Report

On the above date and time whilse assigned to admissions two, this writer was conducting a full search of newly committed inmate #180878, [redacted]. Inmate [redacted] was court sentenced to ten days in the County Jail, therefore being subject to a complete strip search. This writer upon ordering inmate [redacted] to remove all clothing and instructed him not to put on any clothes until further advised to. This writer asked inmate [redacted] to lift up his testicles to which he refused. This writer repeatedly asked inmate to lift his testicles and move his hands out of the way, again he refused. This writer visibly saw silver duct tape in the testicle area with a bulge under it. This writer asked inmate [redacted] several times as to what was under the duct tape, to which he replied, "A Boil". This writer informed inmate [redacted] that the duct tape had to be removed and if indeed he had a boil medical staff would be notified and proper treatment would be received. Inmate stated he wanted a sergeant present and began verbally shouting that he was not removing the duct tape, this writer notified Admissions one, Ofc. Decicco to notify 16-3. Inmate [redacted] kept asking this writer as to why he was being fully stripped searched, informing me he was only here for a ten day sentence. This writer informed inmate [redacted] that per policy, being a sentenced commitment he was subject to a full search. Inmate

[redacted] was ordered by 16-3 several times that the tape had to come off, to which he refused. Inmate [redacted] was told he would be placed in full restraints if he didn't comply, to which he stated, "do what you have to do". Inmate [redacted] was then placed in full restraints by this writer and Ofc. Decicco, and escorted to cell # 40. This writer observed Ofc. Decicco search cell # 40 prior to inmate being placed in it and cell was secure. This writer per 16-3, Sgt. Nilson then removed full restraints from inmate [redacted] and placed his hands behind his back, in an attempt to keep inmate [redacted] from retrieving possible contraband. Upon entering cell to remove restraints, this writer saw about fourteen to fifteen single matches on the floor of cell #40, along with ripped clear plastic bags. This writer proceeded to pat frisk inmate [redacted] again, when a bag of green leafy substance, rolling papers, a bag containing approximately five orange pills fell to the ground. Inmate [redacted] would not answer what was in tape, this writer ordered him to open his mouth, he refused several times. Inmate [redacted] then spit out mouthful of green leafy substance in to this writers glove. This writer along with 16-3, admissions one and 17-1, Lt. Gaunt, took inmate in to the admissions bathroom where he was stripped searched again, more rolling papers and the duct tape was recovered, all items were placed in an evidence bag and turned over to 16-3, Sgt. Nilson. Incident was video taped by Sgt. Nilson, inmate was charged by this writer with *.708 refusal to submit to a search, .256, refusing to obey an order of any staff member, *.203, possession or introduction or

making of any prohibited substances, such as drugs, intoxicants or related paraphernalia not prescribed for the inmate by medical or dental staff, .554, possession of tobacco products or matches. Inmate [redacted] will be transferred to D-Right per 16-3, and placed in high security.

AMICUS CURIAE BRIEF

AUG 26 2011

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* COOK COUNTY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois ("Cook County"), the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing the County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (Ill. 2005). Cook County is responsible for paying settlements and judgments arising from constitutional and common law tort actions against county officials, including the Sheriff of Cook County (the "Cook County Sheriff" or the "Sheriff"). *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (Ill. 2003).

The outcome of this case will impact sheriffs throughout the nation who operate county jails. Under Illinois law, the Cook County Sheriff operates the Cook County Department of Corrections (the "Cook County Jail"). *See* 55 ILCS 5/3-6017 (2011) (stating that sheriffs in Illinois "have the custody and care of the courthouse and jail of his or her county").

In a recent federal lawsuit, detainees filed a Rule 23(b)(3) class action for damages against Cook County, the Cook County Sheriff and several individual defendants alleging that the practice of conducting blanket visual body cavity searches of arrestees entering the jail population after contact with persons outside the jail violated the Fourth Amendment. *See Young v. County of Cook*, 616 F. Supp. 2d 834 (N.D. Ill. 2009).

In *Young*, the district court held that "courts of appeal have generally ruled that a detainee held on a

misdemeanor charge not related to weapons or drugs may not be strip searched absent individualized reasonable suspicion that he or she is carrying such contraband." *Id.* at 846, In adopting and applying this legal principle, neither the Seventh Circuit in *Mary Beth G. v. City of Chicago* nor the district court in *Young* were faithful to the balancing test set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979). *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272-1273 (7th Cir. 1983); *Young*, 616 F. Supp. 2d at 845-847.

The district court in *Young* certified a damages class. *Young v. County of Cook*, 2007 U.S. Dist. LEXIS 31086 (N.D. Ill. April 25, 2007).[1] Even though the defendants believed (and continue to believe) that neither *Mary Beth G.* nor *Young* properly applied *Bell*, the defendants paid $55 million to settle the *Young* lawsuit because of the extraordinary size of the class (over 250,000 members[2]) and the concomitant enormity of the County's potential exposure. *See* Christopher Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections*, 45 Creighton L. Rev. No. 1 (forthcoming 2011) (hereinafter Keleher, *Judges as Jailers*), http://ssrn.com/abstract=1910709 at 2.

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1. The County and the Sheriff believed (and continue to believe) that the damage claims in *Young* were far too individualized to be suitable for class treatment. Unfortunately, this case concluded prior to this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Under *Wal-Mart*, certification of the *Young* plaintiffs' Rule 23(b)(3) class would have been particularly inappropriate, as commonality was lacking.

2. See the informational website of the plaintiffs' class counsel in *Young* at http://www.cookcountystripsearch.com.

Cook County paid this enormous settlement rather than face potential economic catastrophe. In this regard, Cook County could not risk a potential judgment in excess of $500,000,000.00 in the hope that the Seventh Circuit or this Court would reverse the district court's mis-application of *Bell*. Under such financial pressure, the County had no choice but to retreat from the battlefield of litigation.[3]

Yet, the Cook County Sheriff continues to operate the Cook County jail, a large and dangerous county jail. And the County is liable for any judgment entered against the sheriff. *See Carver,* 203 Ill. 2d at 522, 787 N.E.2d at 741 (Illinois counties are liable for judgments against the County sheriff); *see also Holly v. Woolfolk*, 415 F.3d 678, 680 (7th Cir. 2005) (describing Cook County Jail, the third largest jail in the nation, as "huge and unruly"). This appeal presents the exact same issue from *Young*: What test should courts employ when determining whether a policy of strip searching arrestees entering the jail population after contact with persons outside the

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3. Subsequent to the resolution of *Young*, the Sheriff discontinued the policy of blanket strip searches. The Sheriff continues to do virtual strip searches using the L3 body scan technology and does strip searches for cause. It is significant to note that on March 19, 2009, after the blanket strip searches stopped at Cook County Jail, a detainee named Bennie Ellison smuggled a 38-caliber handgun into the Jail by tying the gun to the drawstring of his shorts and letting it dangle between his legs. Mr. Ellison feigned that he walked through the scanner, but walked around it and brought a gun into the Cook County Jail. *See Chicago Tribune*, March 30, 2009, article at http://archive.chicagobreakingnews.com/2009/03/cops-man-hid-gun-from-police-after-arrest.html.

jail violates the Fourth Amendment? Cook County has a strong interest in the resolution of this issue.

Amicus is the legal representative of a unit of state government. As a result, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Cook County, Illinois, therefore, respectfully submits this brief as *Amicus Curiae* in support of respondents in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by respondents Board of Chosen Freeholders of the County of Burlington, Burlington County Jail, Warden Juel Cole, John Does 1-5 of Burlington County Jail, Essex County Correctional Facility and Essex County Sheriff's Department.

SUMMARY OF ARGUMENT

Bell held that a mandatory policy of body cavity searches for all detainees -- regardless of the reason for their incarceration -- at a federal short-term custodial facility after contact visits with outsiders does not violate the Fourth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). This Court reasoned that a "detention facility is a unique place fraught with serious security dangers," *Id.* at 559, the management of which "courts are ill equipped to deal with." *Id.* at 548.

In the 32 years since this Court decided *Bell*, several circuits[4] have virtually turned *Bell* on its head and held that the Fourth Amendment forbids strip searching misdemeanant arrestees in correctional facilities absent reasonable suspicion.[5] Some of these cases do not involve the practice of conducting searches prior to entry into a county jail or prison.[6] The cases applying the "reasonable suspicion" standard to challenges to strip searches in jails or prisons pay lip service to *Bell* but essentially ignore its holding.

In many ways, the watering down of *Bell* reached its zenith in *Young*, a case which held that the Cook County Sheriff violated the Fourth Amendment by conducting strip searches on all detainees entering the Cook County

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4. *See Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997) (holding that *Bell* requires officers to have a reasonable suspicion that a particular detainee harbors contraband prior to conducting a strip or visual body cavity search of detainees held in municipal jails for minor offenses); *Roberts v. State*, 239 F.3d 107, 112 (1st Cir. 2001) (applying the reasonable suspicion standard from *Swain* to strip searches at a State prison); *Stewart v. Lubbock County*, 767 F.2d 153, 156-57 (5th Cir. 1985) (applying the "reasonable suspicion" standard to strip searches of arrestees on minor misdemeanor or traffic violations); *Weber v. Dell*, 804 F.2d 796, 802 (2nd Cir. 1986) (same); *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (same); and *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (same).

5. *See also* Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 3.

6. *See, e.g., Mary Beth G. v. Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (applying reasonable suspicion standard to determine whether strip searches in a municipal detention facility of persons arrested for traffic violations violated the Fourth Amendment).

Jail after contact with persons outside the jail. The district court in *Young* reached this conclusion even though the Sheriff cited safety and security as the reason for the strip search policy and presented substantial evidence of contraband being smuggled in the Cook County Jail despite the security measures in place. *See Young*, 2007 U.S. Dist. LEXIS 31086 at *26 (noting that the Sheriff submitted evidence of sixty-one separate instances where strip searches revealed attempted smuggling). Many brawls and stabbings occur at the Cook County Jail.[7] Despite this substantial evidence of violence at the Cook County Jail, the district court in *Young* gave no weight to the security concerns regarding contraband that

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7. *See Holly*, 415 F.3d at 679 (extensively listing a series of serious stabbings, gang fights and altercations between detainees and noting that detainees in the Cook County Jail also attack jail guards, albeit not as often as other inmates); "Inmate stabs four while attempting escape at hospital," *Daily Southtown*, March 22, 2007, (article can be found at http://www.suffredin.org/news/newsitem.asp?language=english&newsitemid=2233) (while detainee Willis Reese from the Cook County Jail was receiving medical treatment at a hospital outside the jail complex, he went to the restroom, emerged with five inch long jailhouse made knife known as a shank and stabbed four people while trying to escape: he stabbed a corrections officer in the neck, he stabbed a nurse and a civilian in the arms and he stabbed the driver of a shuttle bus in the chest); Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 19, n. 145, *citing Chicago Tribune*, May 14, 2008 article "11 Guards And 7 Inmates Injured In Cook Jail Brawl;" *Chicago Tribune*, December 30, 2007 article "Six Cook County Inmates Injured In Brawl" and *Chicago Tribune*, May 29, 2008, "Three Inmates Seriously Hurt In Stabbing At Cook County Jail." *See also* "11 Injured In Fight At Cook County Jail," *Chicago Tribune*, August 6, 2009 (article posted at http://archive.chicagobreakingnews.com/2009/08/at-least-6-stabbed-at-cook-county-jail.html).

prompted strip searches of all arrestees coming into the Jail. In *Bell* (the case that *Young* purported to follow but did not), this Court recognized the importance of strip searches in securing a jail facility, even though the prison officials in *Bell* provided evidence of only one instance where an inmate smuggled contraband on his person:

> Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71-76, and in other cases. (citations omitted) That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell, 441 U.S. at 559. The stark differences between the legal standards applied in *Bell* and *Young* show the great distance to which some lower courts have strayed from *Bell*.[8]

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8. The *Bell* majority held that strip searches in prisons did not constitute punishment and, as a result, did not violate the Due Process Clause of the Fifth Amendment. *Bell*, 441 U.S. at 560-561. In dissent, Justice Stevens stated his view that strip searches violated due process, as they were "punitive in character" and "the least justifiable" of the measures challenged in *Bell*. *Id.* at 588, 594-595 (Stevens, J., dissenting). In *Young*, the district court likewise concluded that strip searches of groups of detainees at

Three recent circuit decisions, however, have followed *Bell*: *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (*en banc*) (holding that strip searches of arrestees that are no more intrusive than those upheld in *Bell* are constitutionally permissible; *Bull v. San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (*en banc*) (holding that "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*" and thus was constitutionally permissible) and the decision below, *Florence v. Board of Chosen Freeholders of Burlington*, 621 F.3d 296 (3rd Cir. 2010). *Powell*, *Florence* and *Bull* are consistent with the spirit and holding in *Bell*.

Nonetheless, petitioner asks this Court to reverse the Third Circuit decision below and to apply the reasonable suspicion standard, (Pet. Br. 11, 20) a standard that cannot be reconciled with the holding in *Bell*. This standard is problematic in another important respect: it is inflexible and unworkable, as it attempts to install a "one size fits all solution" to the question of whether a policy of strip searching arrestees entering a correctional facility violates the Fourth Amendment. *Amicus* submits that the application of *Bell* and the multi-factor test from *Turner*, as set forth in *Bull*, is the superior approach for determining whether strip searches are constitutionally permissible in a given situation.

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the Cook County Jail constituted punishment and violated due process. *Young*, 616 F.Supp.2d at 854-855. The district court found that conducting strip searches of male detainees without privacy screens "greatly enhanced their discomfort and humiliation." *Id.* at 851. It is, therefore, apparent that the district court in *Young* did not follow the holding in *Bell* but choose instead to follow Justice Stevens' dissent.

Unlike the reasonable suspicion standard (which considers whether a jailer has reason to believe that a particular arrestee is smuggling contraband), application of the *Turner* factors necessitate consideration of: (1) whether the strip search policy is related to legitimate penological interests, (2) whether a rational connection exists between the policy and the legitimate governmental interest, (3) what effect accommodation of the asserted constitutional right will have on guards and other inmates and (4) the availability of prison resources. *Bull*, 595 F.3d at 973. The *Turner* factors provide courts with the flexibility to determine whether a policy of strip searching all arrestees entering a jail setting is reasonable under the circumstances.

Consequently, and for the reasons set forth below, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

ARGUMENT

The reasonable suspicion standard poses several significant problems. First, it is contrary to the balancing test from *Bell*. Second, in contravention of *Bell*, it excessively focuses on the crime charged against the arrestee in determining reasonable suspicion. Third, the reasonable suspicion standard is neither flexible nor workable, as it does not provide any guidance regarding the balancing of interests that *Bell* requires. *See Bell*, 441 U.S. at 559 (recognizing that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.")

The Third Circuit decision below should be affirmed, as it follows the holding in *Bell*.

I. Under *Bell*, The Fourth Amendment Does Not Automatically Prohibit Blanket Visual Body Cavity Searches Of Arrestees Entering The Jail Population After Contact With Persons Outside The Jail.

The reasonable suspicion cases from various circuits have muddied the waters regarding the scope of strip search policies in correctional facilities that are permissible under the Fourth Amendment. These cases do not provide any guidance to lower courts or prison officials because, at heart, the cases cannot be reconciled with *Bell*.[9]

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9. One commentator has observed that:

> Lower courts have misread *Bell* in numerous ways. Requiring reasonable suspicion and consideration of a person's charges for a strip search when *Bell* required neither. Asserting the persons searched in *Bell* were serious offenders when the policy encompassed persons arrested for contempt and witness protection participants. Downplaying the "wide-ranging deference" to correctional officials emphasized in *Bell* and its progeny. Concocting criteria for the contraband found by defendant officials. Finally, ignoring the deterrence element of strip searches. The source of these flaws is simple: an interpretation of what judges want *Bell* to say, not what it does.

Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 11, *citing Bell*, 441 U.S. at 524.

Bell, to be sure, cautioned that because "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions . . .[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. *See Block v. Rutherford*, 468 U.S. 576, 589 (1984) (courts may not engage in "an impermissible substitution of [our] view on the proper administration of [a correctional facility] for that of the experienced administrators of that facility"); *see also Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

Bell further held that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of *substantial evidence* in the record to indicate that the officials have *exaggerated* their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." (emphasis added) *Id.* at 547-548; *citing Pell v. Procunier*, 417 U.S. 817, 827 (1974).

As to *Bell*'s first factor, this Court recognized that the policy of the Metropolitan Correctional Center (the "MCC") of conducting visual, and sometimes digital, searches of a detainee's anus and genitals after every contact visit was a "gross violation of personal privacy." *Id.* at 558. In regard to the second factor, the Court did not "doubt... that on occasion a security guard may conduct the search in an abusive fashion." However, the Court bypassed concerns regarding abuses that occurred during particular searches to uphold the policy as a

whole because the issue was not whether the individual searches were unreasonable, but "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause." *Id.* at 560 (emphasis provided)

In addressing the third and forth factors, *Bell* placed substantial weight on both the justification for the searches (security), and the location of where those searches took place (a correctional facility). This Court stated that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546; *see also Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (holding that a correctional facility "carries with it the circumscription or loss of many significant rights as... a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security"); *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (prison security is a compelling state interest and deference is due to institutional officials' expertise in this area); and *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (internal security is "perhaps the most legitimate of penological goals").

In a separate opinion, Justice Powell stated that "some level of cause, such as a reasonable suspicion, should be required to justify" body-cavity searches of inmates. *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). The *Bell* majority did not adopt Justice Powell's view and did not require the MCC to show individualized suspicion, or to distinguish between detainees and prisoners to justify their search

policy. This Court reasoned that an individual is in custody does not indicate what type of risk they would pose to jail security and order.[10] *Id.* at 547; *see also Block*, 468 U.S. at 587 (adopting *Bell*'s reasoning where it held that "[i] t is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits.")

Moreover, *Bell* held that the single instance of attempted smuggling,[11] along with the remote possibility that detainees could smuggle contraband in a body cavity in these circumstances,[12] did not undermine MCC's justification for their search policy because the absence of a record could easily be construed as evidence of the

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10. The Court noted that pretrial detainees at the MCC, like detainees at the CCDOC, may "pose a greater risk of escape than convicted inmates...where resided convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted." *Id.* at 547.

11. In dissent, Justice Stevens emphasized that the MCC failed to provide *any* examples where a detainee attempted to smuggle contraband into Jail after a contact visit. *Bell*, 441 U.S. at 591 (Stevens, J., dissenting).

12. In dissent, Justice Marshall argued MCC's "security concern" was unfounded because the following security measures made smuggling contraband in a detainee's body cavity a virtual impossibility: (1) visitors and their packages were thoroughly searched by a metal detector, fluoroscope, and by hand; (2) the contact visits occurred in a glass-enclosed room that was continuously monitored by correctional officers; and (3) the detainees wore a one-piece jumpsuit that zipped in the front. *Bell*, 441 U.S. at 577-578 (Marshall, J., dissenting).

policy's successful deterrent effect. *Bell*, 441 U.S. at 559. Finally, *Bell* disregarded a "less intrusive" means of detecting contraband through metal detectors as untenable because [the] logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers. *Id.*, *citing United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557 (1976).

The *Bell* majority did not adopt the reasonable suspicion standard for visual strip searches in correctional facilities that Justice Powell proposed in *Bell* and that petitioner now urges this Court to adopt. (Pet. Br. 20, 21.) The better and more flexible approach is the application of *Bell* and the *Turner* factors that the Ninth Circuit applied in *Bull* when it considered whether San Francisco's strip search policy violated the Fourth Amendment. *Bull*, 595 F.3d at 975.

II. This Court Should Re-Affirm *Bell* And, In So Doing, Apply The First, Third and Fourth *Turner* Factors To Determine Whether Visual Body Cavity Searches Of Arrestees Are Permissible Under The Fourth Amendment.

Amicus Police Accountability Project argues that the district court in *Young* "found that the jail officials were unable to show that persons entering the jail on minor charges 'routinely possessed contraband.'" (Pol. Account. Proj. Br. 10.) This argument presents an incomplete picture. The defendants in *Young* established that strip searches recovered contraband that detainees attempted to smuggle into the jail. *See Young*, 2007 U.S. Dist. LEXIS 31086 at *26. The Sheriff simply did not know

who possessed such contraband prior to the searches. And that is precisely the point. Blanket strip searches help secure large correctional facilities by limiting the flow of contraband into such facilities and by providing a deterrent to smuggling. *Bell* recognized the penological need to conduct such strip searches and held that these searches did not violate the Fourth Amendment. *Bell*, 441 U.S. at 560-561.

The reasonable suspicion cases post-*Bell* unjustifiably undermine this important security measure. In dwelling exclusively on the interests of persons charged with misdemeanors or lesser offenses -- something that *Bell* does not command -- the proponents of the reasonable suspicion standard "see the trees but not the forest." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 100 (1987) (White, J., dissenting). A blanket strip search policy protects all persons in the jail community: detainees charged with lesser or greater offenses, jail guards and staff.

Cook County Jail often has over 9,000 detainees and inmates in custody. On any given day, thousands of detainees enter jail, leave jail or return to jail after appearing in court. Other jails throughout the nation have varying sizes, varying jail populations and varying resources. Consequently, this Court should adopt an approach that considers these variables when balancing the individual rights of persons entering a jail and the security concerns of jailers. As *Bell* noted:

> The test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application. In each case it

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell, 441 U.S. at 559. In balancing these interests, the Ninth Circuit in *Bull* applied not only principles from *Bell* but also the multi-factor test from *Turner* to determine the reasonableness of a prison regulation.

While *Turner* itself did not address the constitutionality of a strip search policy in a jail or prison, this Court recognized that the standard of review of prison regulations "adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). *See also Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995), *citing Turner*, 482 U.S. at 89 (applying the *Turner* standard in plaintiff's Fourth and Eighth Amendment challenges to jail regulations regarding monitoring of inmates and detainees to determine "whether the regulation [was] reasonably related to legitimate penological interests"). *Turner* addressed claims under the First Amendment and the Due Process Clause. Yet, nothing in *Turner* limits its application to only cases brought under those constitutional provisions.

Under *Turner*, prison regulations that infringe a prisoner's constitutional right are valid so long as they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This is true even when

the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). *Bell* teaches that securing a correctional facility is a top priority for jail and prison officials:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Bell, 441 U.S. at 559-560 (emphasis in the original).

To balance these interests, *Turner* set forth the following four factor test: (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced; (2) whether the inmates have alternative means of exercising the restricted right; (3) whether and the extent to which accommodation of the asserted right will impact prison staff, inmates' liberty, and the allocation of limited prison resources; and (4) whether the contested regulation is an "exaggerated response" to prison concerns and if there is a "ready

alternative" that would accommodate inmates' rights. *Turner*, 482 U.S. at 89-91. *Bull* recognized that the second *Turner* factor (whether the inmates have alternative means of exercising the restricted right) is not applicable to a strip search policy. *Bull*, 595 F.3d at 973, n. 9.

Once again, this Court recognized that prison security is a "core function of prison administration" and judgments "regarding prison security 'are peculiarly within the province and professional expertise of corrections officials.'" *Turner*, 482 U.S. at 86, 92 (citations omitted). As such, the Court held that in the "absence of *substantial* evidence in the record to indicate that officials have *exaggerated* their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 86 (emphasis added). Consequently, under the first *Turner* factor, a blanket strip search policy is rationally related to the legitimate government interest of securing a correctional facility by eliminating or at least reducing the amount of contraband within the facility. *Ibid.*

The application of the third and fourth *Turner* factors will vary from facility to facility, resulting in a flexible, *ad hoc* approach to the sometimes difficult question of whether a particular strip search policy is permissible under the Fourth Amendment. In contrast, the reasonable suspicion standard does not provide any meaningful guidance to lower courts or jailers on the permissibility of strip searches under various circumstances at correctional facilities. Prisons and jails throughout the nation vary in size and the number of detainees held on felony charges as opposed to misdemeanor charges or other minor offenses.

In determining whether security measures such as strip searches are constitutionally valid and permissible, application of the third and fourth *Turner* factors is not only more faithful to *Bell* than the "one size fits all" reasonable suspicion standard that petitioner proposes but is also the superior approach. Under these *Turner* factors, consideration of variables such as the size of the jail, the number of detainees at the jail, the number of detainees transported in and out of the jail on a daily basis and the nature of the jail population (how many persons arrested for felonies or misdemeanors) would determine whether the accommodation that petitioner seeks (*i.e.*, discontinuation of strip searches in county jails) would impact the safety and security of guards, staff and detainees. In addition, a court evaluating a constitutional challenge to a strip search policy would need to consider a reasonable allocation of available resources would allow for alternative methods of conducting searches. Courts would also have to consider whether such alternative methods properly secure the jail or prison.

In another context, this Court applied a flexible approach over a more rigid one to determine whether the delay from a warrantless seizure of property in an *in rem* civil forfeiture action violated due process. *See United States v. $8,850*, 461 U.S. 555 (1983) (holding that applying the flexible "speedy trial" factors from *Barker v. Wingo*, 407 U.S. 514 (1972) on an *ad hoc* basis was "an appropriate inquiry for determining whether the flexible requirements of due process have been met"). In a similar vein, this Court should apply the flexible *Turner* factors, as this approach will guide those who attempt to balance serious security concerns with the right of detainees and prisoners under the Fourth Amendment.

Petitioner, however, argues against the application of the *Turner* factors, stating that "[t]here is no substantial justification for strip-searching all detainees." (Pet. Br. 40, n. 14.) Petitioner's position cannot be reconciled with *Bell*, which upheld a blanket strip search policy. Moreover, and cardinally, petitioner's position does little more than inform jailers that they cannot conduct strip searches to stop or reduce the flow of contraband into their facilities. *Bell* did not mandate the elimination of this security measure in jails and prisons. This Court should re-affirm this holding in *Bell* and adopt a standard that applies the principles of *Bell* and *Turner* to future constitutional challenges to jail or prison strip search policies.

CONCLUSION

Amicus respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF OF THE COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The County Commissioners Association of Pennsylvania ("CCAP") is an organization which came into being 125 years ago in 1886 as a largely volunteer group. Beginning in the late 1880's and through 1955, CCAP and its predecessor, the Pennsylvania State Association of County Commissioners ("PSACC") received recognition from the Pennsylvania General Assembly in various statutes permitting the Association to be designated as a "State Association," permitting the Association to hold annual meetings and permitting the Association to cooperate with other similar state associations. Under Pennsylvania's County Code of 1955 ("The County Code," Act of August 9, 1955, P.L. 323), CCAP is recognized as a state association empowered to discuss and resolve questions arising in the discharge of the duties and functions of the respective officers of Pennsylvania's counties and to provide uniform, efficient and economical means of administering the affairs of Pennsylvania's counties. 16 P.S. §441(a).

The work of CCAP is carried out by its committees. One of its committees is the present Court and

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[1] No counsel for a party authored this brief in whole or in part. Further, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or their counsel made a monetary contribution to this brief's preparation or submission. Both parties have filed written consents with the Clerk of this Court, authorizing the submission of briefs amicus curiae.

Corrections Committee which came into existence in the early 1980's as the outgrowth of a Prison Task Force Committee. The Court and Corrections Committee was established by a change to the Association's bylaws in the early 1990's, with the mission to develop and advocate for uniform practices in the administration of criminal justice from pre-trial through trial and incarceration. In fact, that mission follows through incarceration and into a convict's rehabilitation. It involves the development of uniform sentencing policies and jail administration policies in connection with, and interfacing with, Pennsylvania's State Corrections System and the Administrative Office of Pennsylvania Courts ("AOPC"). Members of the Court and Corrections Committee include representatives of the AOPC, the Pennsylvania Department of Corrections, the Pennsylvania Wardens Association and the Pennsylvania Adult Probation Officers Association. The Committee is active in developing presentations and has in the past addressed uniform policies regarding strip searches. The Committee also disseminates model standards as well as providing recent case updates affecting prison administration in all counties throughout Pennsylvania.

In addition to the Court and Corrections Committee, CCAP has established an insurance program called the Pennsylvania Counties Risk Pool ("PCoRP") which currently insures 44 counties though an intergovernmental cooperative insurance pool. Its insurance coverage includes liability protection regarding the subject of strip searches. Following this Court's

decision in *Bell v. Wolfish* which will be discussed extensively in the body of this brief, an attorney representing PCoRP developed a written strip search policy which has been updated from time to time and is routinely provided to all of Pennsylvania's counties. The attorney who wrote the policy is now a United States District Court Judge.

CCAP, representing its 67 County members and the administrators of county detention facilities, appreciates the opportunity to address the matters pending in the present case before this Court. CCAP respectfully submits this brief in support of the Respondents, principally the Counties of Burlington and Essex, New Jersey.

SUMMARY OF ARGUMENT

The issue in this case is whether the Fourth Amendment to the United States Constitution permits prison officials to strip search any newly arriving inmate regardless of the circumstances and regardless of the presence of any particular suspicion associated with the incoming inmate. In the present case, the United States Court of Appeals for the Third Circuit held that such searches as a matter of policy and without regard to any particular circumstances surrounding the inmate or the arrest, are permissible under the Fourth Amendment. In so holding, the Third Circuit joined the Eleventh Circuit and the

Ninth Circuit, both of which had issued similar decisions within the previous two years.[2]

The Court of Appeals was correct. That court relied on this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). In that case, this Court held that strip searches of inmates (whether they had been convicted of a crime, were awaiting trial or even if they were witnesses in protective custody), done routinely and done with every inmate after a contact visit, were constitutional under the Fourth Amendment.

The standard for evaluation that this Court articulated in *Bell* and refined in the latter cases of *Block v. Rutherford*, 468 U.S. 576 (1984) and *Turner v. Safley*, 482 U.S. 78 (1987), controls the outcome of this case. *Bell*, *Block*, and *Turner*, all unequivocally counsel affirmance of the Third Circuit's decision in this case, and counsel a ruling to the effect that a strip search of every new incoming inmate, regardless of the presence of suspicion regarding contraband or any other factor, is permissible under the Fourth Amendment. Earlier decisions of the Courts of Appeal that hold otherwise were not correct. Those courts read requirements and holdings in *Bell* that this Court did not articulate in that case.[3] Those decisions created a

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[2] These decisions are inconsistent with many decisions from the Courts of Appeal rendered from 1981 through approximately 2001. As discussed in the body of this brief, we believe that the recent decisions represent correct construction of prior decisions of this Court.

[3] The recent decisions of the Eleventh Circuit and the Ninth Circuit, mentioned above, actually overrule prior cases of those

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requirement for reasonable suspicion of the presence of contraband or other factors jeopardizing institutional security, before a strip search could be conducted. But, as will be demonstrated below, this Court did not require reasonable suspicion of such circumstances in *Bell*. *Bell* and its progeny require that the decision of the United States Court of Appeals in the present case be affirmed and that a strip search of any new incoming inmate be permitted regardless of the presence of reasonable suspicion of any fact or circumstance undermining institutional security.

ARGUMENT

I. SUSPICIONLESS SEARCHES OF INCOMING INMATES ARE PERMISSIBLE UNDER THE FOURTH AMENDMENT IN ACCORDANCE WITH THIS COURT'S HOLDINGS IN *BELL*, *BLOCK* AND *TURNER*; PRIOR DECISIONS OF THE COURTS OF APPEAL CREATING A "REASONABLE SUSPICION REQUIREMENT" FOR SUCH SEARCHES ARE INCORRECT AND CONTRARY TO *BELL*, *BLOCK* AND *TURNER*, PARTICULARLY CONTRARY TO *BELL*

The issue in this case is whether the Fourth Amendment to the United States Constitution permits a strip search, by prison authorities, of every new

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courts that engrafted a reasonable suspicion requirement for strip searches that this Court did not require in *Bell*.

incoming inmate absent reasonable suspicion or probable cause. CCAP submits that this Court has already answered that question in the affirmative with its decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). In that case, a class of detainees of the Metropolitan Correctional Center in New York City brought a civil rights action pursuant to 42 U.S.C. §1983. Those inmates challenged several aspects of life at the MCC. Pertinent for the present case is the inmates' challenge of universal strip searches after contact visits. This Court reversed a contrary holding of both the United States Court of Appeals for the Second Circuit and the District Court, and ruled that such strip searches were indeed permissible under the Fourth Amendment.

While acknowledging in *Bell* that "there is no iron curtain drawn between the Constitution and the prisons of this country," (441 U.S. at 546), this Court also said the following:

> The court might disagree with the choice of means to effectuate those interests [of maintaining security and similar matters], but it should not second-guess the expert administrators on matters on which they are better informed . . . concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the constitution?
>
> *Bell*, 441 U.S. at 544 (citation omitted)

This Court went on to say: "There must be a mutual accommodation between institutional needs and

objectives and the provisions of the Constitution that are of general application. (citation omitted) This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Bell*, 441 U.S. at 546. Other comments from this Court in *Bell* bear repeating here. All of those comments constitute this Court's rationale in *Bell*, and control the outcome of this case. In *Bell*, this Court said:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee . . . , the practice must be evaluated in the light of the central objective of prison administration: safeguarding institutional security.
>
> * * *
>
> Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility

> are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.
>
> *Bell*, 441 U.S. at 546-48 (citations omitted)

Using these standards, this Court went on in *Bell* to evaluate the constitutionality of the challenged strip search policy. In that connection, this Court said:

> Admittedly [the practice of strip searches] instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility . . . , we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches . . . , and under the circumstances, we do not believe that these searches are unreasonable.
>
> * * *

> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. . . . Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. . . . But we deal here with the question [of] whether visual body cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.
>
> *Bell*, 441 U.S. at 558-60

Perhaps this Court's concluding comments in *Bell* are most revealing of all. Commenting upon the proper balance to strike between Constitutional rights, the Courts and effective and secure administration of prisons in this Country, this Court said:

> [T]he federal courts rightly have condemned . . . sordid aspects of our prison systems. But many of these same courts have, in the name of our Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular

> institution under examination. But, under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution. . . . The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.
>
> *Bell*, 441 U.S. at 562-63

Against these standards, it is clear that the policies of the New Jersey prisons at issue do indeed comport with the Fourth Amendment. In the judgment of officials of those institutions, the strip search of every new incoming inmate is necessary for a myriad of reasons. These include the detection of contraband, the detection of gang affiliation by the uncovering of tattoos and the detection of debilitating skin conditions such as MRSA.[4] At various stages in the present

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[4] Amici have advocated on the Petitioner's behalf. Most of the amicis' briefs cite virtually no case law and reference *Bell v. Wolfish* only in passing. All of those amici briefs have one conspicuous flaw in common: they attempt to substitute the judgment of the amici for the judgment of the Burlington and Essex County Prison Officials. For instance, the Medical Society of New Jersey posits that prison employees are ill-equipped to detect

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case, the Petitioner has suggested that the record reveals little or no actual instance of the smuggling of contraband into the Burlington or Essex County Prisons by incoming inmates. This circumstance, the Petitioner contends, demonstrates that strip searches of newly arriving inmates as a matter of course are unnecessary, therefore lacking in reasonable suspicion and therefore violative of the Fourth Amendment. In making this argument, though, Petitioner is making the same error that his amici make: he is ignoring important aspects of *Bell* and attempting to substitute his judgment for that of the correctional officials in whose special training and experience the judgment is appropriately lodged. *Bell* addresses this issue.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular

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skin conditions. That may be so, but most if not all trained prison employees can recognize a questionable cut or other wound on an incoming inmate's body and can and undoubtedly do refer such arriving inmates for medical evaluation. The Academics on Gang Behavior amicus brief posits that gang tattoos typically appear only on certain parts of the body and that, in some instances, may not reveal any present affiliation with a gang. While such issues may be worthy of some degree of consideration, substituting amicis' judgment for that of the applicable corrections officials would directly violate the teachings of *Bell* and its progeny that we will describe in the body of this brief.

> intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. (citations omitted) A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are demonstrated in this record and in other cases. (citations omitted) That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.
>
> *Bell*, 441 U.S. at 559

Bell alone controls the proper result to the present case. This Court's subsequent decisions reinforce that fact.

One such decision is *Block v. Rutherford*, 468 U.S. 576 (1984). In that case, inmates at the Los Angeles County Central Jail challenged that institution's policies of denying contact visits *in toto* and of conducting random searches of cells in the absence of the inmates.

In reversing the District Court and the Court of Appeals, this Court, by Chief Justice Burger, held that both policies were constitutional. In making that

decision, Chief Justice Burger quoted some of the passages from *Bell* that we have quoted above and concluded: "The principles articulated in *Wolfish* govern resolution of this case." 468 U.S. at 595. In *Block*, this Court went on to say:

> In rejecting the District Court's order, we do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society. We hold only that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.
>
> *Block*, 468 U.S. at 589

Chief Justice Burger concluded the Court's opinion in *Block* by observing as follows:

> Moreover, we could not have been clearer in our holding in *Wolfish* that [these are] matter[s] lodged in the sound discretion of the institutional officers. We affirm that proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees.
>
> *Block*, 468 U.S. at 591 (citations omitted)

This Court reaffirmed this line of jurisprudence, requiring deference to the prison officials who are trained and experienced in administering such unique places, in *Turner v. Safley*, 483 U.S. 78 (1987). There, in a class action, various inmates housed by the Missouri Department of Corrections filed suit challenging two policies of that department. The first policy banned inter-institutional correspondence between inmates unless the inmates were immediate family members, unless the correspondence "concerned legal matters" or unless the correspondence was approved by each of the involved inmates' treatment teams. The second policy required approval of an institutional superintendent for the marriage of inmates, and also required that such permission be given only if the reasons for the marriage were compelling. This Court affirmed in part and reversed in part, the decision of the United States Court of Appeals for the Eighth Circuit. Ultimately, this Court held that the correspondence regulations were valid, but that the marriage regulations were not. In making this decision, this Court culled several of its prisoners rights cases from previous terms, including *Bell*. Specifically, the Court looked to *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 596 (1974); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Jones v. North Carolina Prisoners Union*, 433 U.S. 119 (1977) and, most importantly, *Bell v. Wolfish*. Analyzing those cases in *Turner*, the Court formulated the standard for evaluating a Constitutional claim in the context of a prison environment. The Court said:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if prison administrators . . . , and not the courts [are] to make the difficult judgments concerning institutional operations. (citation omitted) Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.
>
> *Turner*, 482 U.S. at 90-91

Clearly, the cases noted above, particularly *Bell*, require that the decision of the United States Court of Appeals for the Third Circuit in the present case be affirmed. In the trained, sound and experienced judgment of the officials facing day-to-day administration

of the Burlington County and Essex County Prisons in New Jersey, a strip search of each new incoming inmate is necessary to detect contraband, maintain security, identify possible sources of infectious disease (a particularly pernicious circumstance in the closed environment of a prison) and assist with detection of gang affiliation. Perhaps that judgment is not perfect in the medical sense. According to at least one amicus acting on Petitioner's behalf, that judgment is something less than perfect in the sociological (gang) sense. But, the fact or notion that such judgments may be imperfect is irrelevant. *Bell* and *Turner* require the courts, as the Third Circuit correctly held, to defer to those judgments unless or until it can be shown that the concerns underlying those judgments are exaggerated. As *Bell* shows, the fact that there may be a low incidence of the smuggling of contraband by incoming inmates, does not render the correction officials' judgments invalid, and it does not render the policy of suspicionless strip searches of incoming inmates, unconstitutional. This Court's decisions show unquestionably that the Third Circuit was correct and that its judgment should be affirmed.

It remains to analyze prior decisions of the Courts of Appeal. We submit that the earlier decisions requiring "reasonable suspicion" for the initiation of a strip search of an incoming inmate, are not correct. The more recent decisions of the Courts of Appeal, including the one at issue here, have properly applied *Bell* and the related prisoners rights cases cited above. The quantity of Court of Appeals decisions requiring

reasonable suspicion does not counsel that that standard be applied in the present case. We will address these Court of Appeals decisions in the following section.

II. THE MORE RECENT DECISIONS OF THE COURTS OF APPEAL ON THIS ISSUE, INCLUDING THE DECISION OF THE THIRD CIRCUIT IN THE PRESENT CASE, CORRECTLY FOLLOW *BELL*, AND THE EARLY COURTS OF APPEAL DECISIONS SHOULD NOT SUGGEST REVERSAL OF THE THIRD CIRCUIT'S DECISION IN THE PRESENT CASE

From approximately 1981 through 2001, a line of decisions developed in the Circuit Courts of Appeal wherein those courts purported to follow *Bell*, yet created a requirement of reasonable suspicion of the presence of contraband or other items in order to constitutionally justify the strip search of each new incoming inmate. These decisions require that there be some sort of reasonable suspicion with respect to the incoming inmate's criminal history, the nature of the crime for which the inmate was arrested or, perhaps, the circumstances of the arrest itself. This is somewhat surprising in that the phrase "reasonable suspicion" appears nowhere in the majority opinion in *Bell*. In fact, Justice Powell's uniquely brief concurring opinion (which we will quote in its entirety below) suggests quite the opposite: this Court never intended to require reasonable suspicion in its *Bell* decision,

and the present case is a perfect opportunity for this Court to clarify that issue unequivocally. Possibly, the earlier Courts of Appeal decisions were giving undue attention to the balancing of factors described in *Bell*. Clearly, though, those earlier decisions did not properly follow this Court's admonition to defer to the expert judgment of correctional officials. In any event, the earlier decisions that now create the split in the Circuits are, in roughly chronological order, *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Stewart v. Lubbock County, Texas*, 767 F.2d 153 (5th Cir. 1985); *Jones v. Edwards*, 770 F.2d 738 (8th Cir. 1985); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997); and *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001). This list is not intended to be exclusive, but it shows a pervasive trend that existed until 2008: although this Court never used the phrase "reasonable suspicion" in its majority opinion in *Bell*, and although Justice Powell's concurrence in *Bell* confirmed that this Court did not intend to require reasonable suspicion for the strip search of an incoming or incarcerated prisoner, these decisions nonetheless require reasonable suspicion for such a strip search.

That trend changed in 2008 and, in our view, brought with the change the required fidelity to this Court's decisions in *Bell* and the other prisoners rights cases cited in the first section of this brief.

Specifically, the United States Court of Appeals for the Eleventh Circuit overruled its decision in *Wilson* and, in our view, applied the proper degree of fidelity and *stare decisis* to *Bell* in the case of *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008). In that case, the Eleventh Circuit held that a correct reading of *Bell* permits suspicionless strip searches of all new incoming inmates. The Eleventh Circuit said:

> The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision certainly is inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.
>
> First, and most fundamentally, [this] Court in *Bell* addressed the strip search policy, not any individual searches conducted under it. [This] Court spoke categorically about the policy, not specifically about a particular search or an individual inmate. (citation omitted)
>
> * * *
>
> The policy that [this] Court categorically upheld in *Bell* applied to all inmates, including those charged with lesser offenses and even those charged with no wrongdoing at all who were being held as witnesses in

> protective custody. (citation omitted) The policy did not require individualized suspicion. Just the opposite. It called for a search of every inmate returning from a contact visit regardless of whether there was any reasonable suspicion to believe that the inmate was concealing contraband.
>
> *Powell*, 541 F.3d at 1307

The *Powell* court then continued to analyze *Bell* and distinguished the prior Courts of Appeal decisions that created the reasonable suspicion requirement for strip searches. The Eleventh Circuit essentially stated that no such requirement is present in *Bell* and that, at least in the Eleventh Circuit's opinion, the decisions that are contrary to *Bell*, come about from the misreading of a single sentence in that opinion. While we express no opinion on that particular subject, the fact remains that the Eleventh Circuit was correct. This Court did not create a reasonable suspicion requirement in *Bell* and the present case is a uniquely good opportunity for this Court to clarify that issue (if it needs clarification) once and for all.

The Eleventh Circuit also reproduced Justice Powell's concurring opinion in *Bell,* using it to prove the fact that this Court in fact did not require reasonable suspicion in *Bell*. While we do not necessarily endorse the use of a concurring opinion to divine a particular holding of this Court or any other court, Justice Powell's brief yet cogent opinion is worth reciting here in its entirety. Indeed, if Justice Powell were incorrect, one would think that the *Bell* majority would have adjusted its opinion to address any

misapprehensions that Justice Powell may have had. The *Bell* majority did not do that, leaving the implication that Justice Powell's reading was correct. Justice Powell's entire concurring opinion is as follows:

> I join the opinion of the Court except the discussion and holding with respect to body cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.
>
> *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part)

Then, in February of 2010, armed with the Eleventh Circuit's decision in *Powell*, the United States Court of Appeals for the Ninth Circuit issued its decision in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010). In that case, the Ninth Circuit, as the Eleventh Circuit had done in 2008, held that *Bell* permits strip searches of each new incoming inmate, regardless of the presence of any "reasonable suspicion."

After exhaustive analysis of *Bell* and some of the Court of Appeals' reasonable suspicion decisions cited above, the Ninth Circuit concluded its opinion thusly:

> In sum, because the circumstances before us are not meaningfully distinguishable from those presented in *Bell*, the balance between the need for the San Francisco strip

> search policy and "the invasion of personal rights that the search entails" must be resolved in favor of the jail system's institutional concerns. (citation omitted) While strip searches are invasive and embarrassing, and while this type of security measure "instinctively gives us the most pause," (citation omitted), we must conclude that under *Bell*, San Francisco's strip search policy was reasonable and therefore did not violate the class members' Fourth Amendment rights.
>
> *Bull*, 595 F.3d at 974

Significantly, in reaching this decision, the Ninth Circuit expressly overruled *Giles v. Ackerman* (cited above) and a related case. We also note that a subsequent decision of the Ninth Circuit, *Byrd v. Maricopa County Sheriff's Department*, 629 F.3d 1135 (9th Cir. 2011), is not contrary to *Bull*. In *Byrd*, the Ninth Circuit reversed summary judgment that the District Court had entered in favor of prison officials. The Ninth Circuit held that a particular search of an incoming inmate violated the Fourth Amendment. But, it was clear from the language of the opinion that the Ninth Circuit's decision turned on the fact that the inmate and the person doing the search were not of the same gender. We express no opinion on the merits of that decision; that is another issue for another day, should this Court so choose.[5]

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[5] In fact, rather than signaling any sort of departure, even more recent decisions of the Courts of Appeal continue the trend of *Powell*, *Bull* and the Third Circuit's decision in the present

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The Third Circuit reached a similar result in the present case. Like the Eleventh and Ninth Circuits before it, the Third Circuit analyzed *Bell* and held that *Bell* did not require any sort of individualized reasonable suspicion to justify the strip search of any incoming detainee. The Third Circuit's opinion in the present case is found at *Florence v. Board of Chosen Freeholders of the County of Burlington*, 621 F.3d 296 (3d Cir. 2010). In reaching its decision, the Third Circuit said:

> Like the Ninth and Eleventh Circuit Courts of Appeal, we conclude that the security interest in preventing smuggling at the

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case. In *Bame v. Dillard*, 637 F.3d 380 (D.C. Cir. 2011), the United States Court of Appeals for the District of Columbia Circuit reversed a district court decision and ordered that summary judgment be granted on qualified immunity grounds in favor of law enforcement personnel. In *Bame*, several people who were arrested after a protest and strip searched, brought suit with claims similar to those Mr. Florence poses here. The D.C. Circuit held that with the arrests occurring *in 2002*, the law was not clearly established to require reasonable suspicion for strip searches. The D.C. Circuit relied primarily if not exclusively on *Bell v. Wolfish* to reach that conclusion. Additionally, a decision consistent with the recent cases may be coming from the United States Court of Appeals for the Fifth Circuit. In *Jimenez v. Wood County, Texas*, 621 F.3d 372 (5th Cir. 2010), the Fifth Circuit affirmed judgment on a jury verdict for a plaintiff who was strip searched upon entry to a penal institution; the case also involved other Section 1983 claims relating to the arrest itself. The *Jimenez* panel rejected an express invitation to overrule *Stewart*. But, on November 18, 2010 as reported at 626 F.3d 870, the Fifth Circuit granted reargument *en banc* in *Jimenez*. That argument was held earlier this year, and the Fifth Circuit's decision remains pending.

> time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*. We reject Plaintiffs' argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*. First, the *Bell* court explicitly rejected any distinction in security risk based on the reason for detention. (citation and footnote omitted) Instead, the security risk was defined by the fact of detention in a correctional facility. (citation and footnote omitted)
>
> Second, *Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates [in *Bell*].
>
> *Florence*, 621 F.3d at 307

The Third Circuit also rejected arguments, properly so in our view, that a low incidence of actual smuggling invalidated the strip searches. In rejecting that argument, the Third Circuit specifically relied on *Bell*. *See Florence*, 621 F.3d at 309. The Third Circuit also reaffirmed this Court's admonition in *Bell* and its other prisoners rights cases that considerable deference must be given to the judgment of corrections officials when it comes to the central, sensitive and compelling issue of security. *See Florence*, 621 F.3d at 310.

The Third Circuit was correct. Similarly, the Eleventh Circuit was correct in *Powell* and the Ninth

Circuit was correct in *Bull*. This Court's jurisprudence, particularly *Bell*, requires that the searches at issue in the present case be upheld as not violative of the Fourth Amendment's prohibition against unreasonable search and seizure. The searches are in fact reasonable, and necessary.

Not only is affirmance of the Third Circuit's decision in this case correct from a jurisprudential standpoint, it would also be correct as a matter of practicality and policy. The cost in manpower, staff time, training time and litigation that would undoubtedly be spawned over the necessarily somewhat subjective standard of reasonable suspicion, would be astronomical. Indeed, as the Third Circuit extensively examined, requiring reasonable suspicion could itself lead to a plethora of suits filed on equal protection grounds. That circumstance would be taxing and vexatious to those charged with the demanding and delicate responsibility of administering a prison. Subjecting those in that capacity to such distractions is patently inconsistent with *Bell*, *Martinez*, *Pell*, *Wolff* and *Turner*. The decision of the United States Court of Appeals for the Third Circuit in the present case, must be affirmed.[6]

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[6] In advocating this position, we are not unsympathetic to Mr. Florence's plight. He was jailed for the better part of a week and strip searched at two different correctional facilities, with his arrest coming about for an old traffic ticket that was in fact paid. He may have a claim under New Jersey law for false

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CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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arrest, false imprisonment or a similar tort. We leave that to Mr.Florence and his counsel to pursue. The single issue certified for appellate review, accepted by the Third Circuit, and accepted on certiorari by this Court, is whether suspicionless strip searches violate the Fourth Amendment. As made clear in the body of this brief, this Court's decisions show unquestionably that the searches at issue, regardless of Mr. Florence's particular circumstances, are constitutional.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CURRENT AND FORMER JAIL AND CORRECTIONS PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are corrections professionals with hundreds of years of collective experience in administering jails and developing and implementing standards for adult and juvenile detention facilities throughout the United States. They include current and former heads of county and state correctional institutions, a former state jail inspector, Past Presidents of the American Jail Association, consultants for the Department of Justice's National Institute of Corrections and numerous correctional institutions, and advisors on strip-search and other standards for the American Correctional Association. *Amici* have extensive first-hand experience with blanket, suspicionless strip-search policies such as the ones at issue in this case, as well as strip-search policies based on reasonable suspicion.[2]

As professionals who have dedicated their careers to correctional administration, *amici* have a substantial interest in ensuring that institutions are safely and properly run. They are committed to ensuring that jails and other institutions implement reasonable and effective policies that balance the need to protect the security and integrity of the institutions with the individual dignity of persons who have been arrested for minor offenses.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

[2] *Amici* are William C. Collins, Paul E. Downing, Robert J. Hall, Jr., James M. Hart, Jon D. Hess, Michael H. Lovelace, Mark D. Martin, Rod Miller, David M. Parrish, and Robert J. Reardon. *See* Appendix of *Amici Curiae*.

SUMMARY OF ARGUMENT

Petitioner Albert Florence was arrested for a minor offense for which he was innocent. He was incarcerated for nearly a week in two county jails until he was taken before a judge who immediately recognized the arrest was erroneous and set him free. By that point, Mr. Florence already had been subjected to two invasive strip searches—notwithstanding jail officials' acknowledgement that there was no reasonable suspicion that Mr. Florence posed any threat to the safety or health of the institutions.

Amici have dedicated their careers to improving the operation of correctional facilities, and several have participated in drafting the authoritative standards for correctional institutions on strip searching arrestees. *Amici* believe that jail administrators should be accorded substantial deference in the adoption and execution of policies and practices that are needed to maintain institutional security. Strip searches like the ones conducted on Mr. Florence, however, simply are not reasonable responses to the minimal risk that arrestees charged with minor offenses pose to a facility.

Suspicionless strip searches of all arrestees—regardless of the nature of the alleged offense or circumstances of the arrest—are inconsistent with the accreditation and certification standards in our profession. Such searches also are contrary to the policies of most correctional institutions, which employ less intrusive search methods at intake and require reasonable suspicion before strip searching individuals under arrest for minor offenses. Professionals and courts alike have acknowledged that strip-search policies based on reasonable suspicion have not led to an increase in security or health

problems in correctional facilities. Indeed, in *amici*'s experience, a blanket, suspicionless strip-search policy is actually less effective than alternative, reasonable-suspicion-based practices that have been used in correctional institutions for decades.

ARGUMENT

EXPERIENCE SHOWS THAT SUSPICIONLESS STRIP SEARCHES ARE NOT NECESSARY TO ENSURE SECURITY OR HEALTH IN CORRECTIONAL FACILITIES

The cornerstone of respondents' position is that blanket, suspicionless strip searches of every arrestee—regardless of the nature of the charge or circumstances of the arrest—are necessary to prevent disease from spreading, gangs from flourishing, and weapons and contraband from becoming readily available in jails. *See* Essex Cert. Opp. 6-7; Burlington Cert. Opp. 18-19, 24. That supposition, which both the majority and dissent below acknowledged was not supported by record evidence in this case, Pet. App. 24a-25a, 31a, is contrary to *amici*'s extensive, first-hand experience in administering correctional facilities. The consensus among corrections professionals, explained below, is that a reasonable, suspicion-based strip-search policy best balances the need to safeguard jails with the need to protect the privacy and rights of the accused.

A. The American Correctional Association Rejects The Need For Suspicionless Strip-Search Policies

The suspicionless strip-search policies respondents advocate are out-of-line with leading correctional standards. The American Correctional Association (ACA) is the oldest and largest international association dedicated to the administration of correctional facilities, and its accreditations and certifications are considered the benchmark for effective jail administration. The ACA rejects suspicionless strip-search policies like the ones at issue here. As the Court recently observed, professional standards like the ACA's inform its determination of "what is obtainable and what is acceptable in corrections philosophy." *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011).

1. The ACA *Performance-Based Standards for Adult Local Detention Facilities* (4th ed. 2004), which several of the *amici* helped develop, sets forth detailed standards for detention facilities seeking ACA accreditation. These standards are recognized as "the national benchmark for the effective operation of correctional systems throughout the United States," and "reflect practical, up-to-date policies and procedures that safeguard the life, health and safety of staff and offenders." *See* ACA, *Standards and Accreditation*, https://www.aca.org/standards/faq.asp; *see also Peterkin v. Jeffes*, 855 F.2d 1021, 1027 n.9 (3d Cir. 1988) (recognizing that the ACA "develop[s] and publish[es] the Standards for Adult Correctional Institutions . . . setting over 450 standards for evaluating every aspect of prison life"). As such, correctional facilities seek accreditation and certification from the ACA as recognition that those facilities comply with ACA standards. For example, the Fed-

eral Bureau of Prisons "utilizes ACA to obtain an external assessment of its ability to meet the basics of corrections," and "continue[s] to prepare all activated facilities for accreditation with the American Correctional Association." U.S. Dep't of Justice, *Strategic Plan Fiscal Years 2000-2005* 79 (2000); *see also* U.S. Dep't of Justice, *Strategic Plan Fiscal Years 2007-2012* 83 (2007).

Relevant here, ACA Standard 4-ALDF-2C-03 provides that "[a] strip search of an arrestee at intake shall *only* be conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband" (emphasis added). The ACA *Performance-Based Standards* accordingly reject the practice of blanket, suspicionless strip searches of individuals arrested for minor offenses. The ACA standards, including the strip-search standard, were developed with support from the American Jail Association, the National Sheriffs' Association, and numerous state and local departments of corrections. *Performance-Based Standards*, *supra*, at xi.

2. Institutions also may receive an ACA certification of compliance with a smaller set of "core" jail standards. In 2010, the ACA published the *Core Jail Standards* (1st ed. 2010). "With the support of the American Jail Association, National Sheriffs' Association, National Institute of Corrections, and the Federal Bureau of Prisons, these standards have been evaluated and tested and represent sound jail policies." *Id.* at viii; *see also id.* at ix (listing participants in developing the *Core Jail Standards* from federal, state, and local corrections institutions). Included within these core standards, which some of the *amici* also helped develop, are strip-search standards. These, too, reject suspicionless strip searches like the

ones at issue here: "A strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband. The least-invasive form of search is conducted." *Core Jail Standards*, *supra*, § 1-CORE-2C-02.

3. *Amici* fully endorse the ACA strip-search standards, which reflect the best practices for prison administration and the measured judgment of the correctional community. The ACA standards were "the work product of corrections practitioners, particularly those employed in jails," and were drafted "with all of America's jails, regardless of size, in mind" following "rigorous field test[ing]." *Performance-Based Standards*, *supra*, at viii. The standards properly balance the need to protect the security and integrity of the institutions with the individual dignity of persons who have been arrested for minor offenses. In *amici*'s view, there is no better measure than the ACA standards to determine "what is acceptable in corrections philosophy." *Plata*, 131 S. Ct. at 1944.

B. Leading Correctional Facilities Apply A Reasonable-Suspicion Standard For Strip Searches Of Individuals Arrested For Minor Offenses

In line with the ACA standards, leading correctional facilities apply a reasonable-suspicion standard in lieu of suspicionless strip-search policies like the ones at issue in this case. The practice of these facilities undermines respondents' argument about the purported necessity of strip searches for all arrestees. *Cf. Johnson v. California*, 543 U.S. 499, 508 (2005) (relying in part on how "[v]irtually all other States and the Federal Government manage

their prison systems"); *McKune v. Lile*, 536 U.S. 24, 35 (2002) (relying in part on the experience of the "Federal Bureau of Prisons and other States").

1. Federal corrections policies, guided in large part by the ACA standards discussed above, have not adopted the suspicionless strip-search policies urged by respondents. For example, Federal Bureau of Prisons policy provides that "[d]etainees charged with misdemeanors, committed for civil contempt . . . or held as material witnesses may not be [strip] searched visually unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." Fed. Bureau of Prisons, Program Statement No. 5140.38, Civil Contempt of Court Commitments § 11 (2004). By contrast, for detainees charged with more serious offenses, the Bureau's receiving and discharge procedures require that "[i]nmates shall be visually [strip] searched and screened with a hand-held metal detector[.]" Fed. Bureau of Prisons, Program Statement No. 5800.12, Receiving and Discharge Manual § 124 (1997).

Similarly, the Department of Justice as well as the Department of Homeland Security's principal investigative arm, the Immigration and Customs Enforcement agency, have developed standards "based on the American Correctional Association Standards" that were "designed for use in reviewing non-federal facilities that house federal detainees to ensure these facilities are safe, humane, and protect detainee's statutory and constitutional rights." Office of the Fed. Det. Tr., Federal Performance-Based Detention Standards Handbook 1 (2011). The standards direct "[t]he facility director [to] ensure[] that a detainee search program exists that preserves constitutional rights." *Id.* at 99. The standards refer to ACA

standard 4-ALDF-2C-03, which provides that "[a] strip search of a detainee at intake shall only be conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." *Id.*

Immigration and Customs Enforcement (ICE) policy does not permit blanket strip searches of detainees: "Staff may conduct a strip search only where there is reasonable suspicion that contraband may be concealed on the person." ICE Detention Standard: Searches of Detainees 5 (2008). Before strip-searching a detainee for contraband, "an officer should first attempt to resolve his or her suspicions through less intrusive means, such as a thorough examination of reasonably available . . . law enforcement records; a pat-down search; a detainee interview; or (where available) the use of a magnetometer or Boss chair." *Id.* at 5-6; *see also* Pet'r Br. 5-6 (describing Boss chair used by Essex County). ICE policy specifically governing admission and release standards also requires that officers have reasonable suspicion to strip search a detainee, and officers must employ less intrusive search methods before resorting to a strip search. *See* ICE Detention Standard: Admission and Release 4-5 (2008). Both ICE Detention Standards documents also refer to ACA standard 4-ALDF-2C-03. *See* ICE Searches of Detainees 2; ICE Admission and Release 2.

For over a decade, the United States Marshals Service has rejected a policy of indiscriminate strip searches, in favor of one based on reasonable suspicion: "Strip searches on prisoners in custody are authorized when there is reasonable suspicion that the prisoner may be (a) carrying contraband and/or weapons, or (b) considered to be a security, escape,

and/or suicide risk." U.S. Marshals Serv., Policy Directive, Prisoner Custody–Body Searches § 9.1(E)(3) (2010); *accord* U.S. Marshals Serv., Policy Directive No. 99-25 (1999).

The Bureau of Indian Affairs (with the assistance of *amicus curiae* Mark Martin) also recently developed draft standards for Native American jails that would permit strip searches of arrestees only "when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband. The least invasive form of search is conducted." Bureau of Indian Affairs, Office of Justice Servs., BIA Adult Detention Facility Guidelines 22 (2010 Draft).

Finally, the National Institute of Corrections of the Department of Justice published a comprehensive handbook for jail administrators, co-authored by *amicus curiae* Mark Martin, that was "intended to serve as a basic desk reference for general information about sound correctional practice that should apply to jails," irrespective of institution-specific factors. Mark D. Martin & Thomas A. Rosazza, Nat'l Inst. of Corr., *Resource Guide for Jail Administrators* 4 (2004). This guide reiterates the federal government's strip-search policy: "Strip searches require reasonable suspicion that an inmate possesses weapons, drugs, or other contraband. Requiring all newly admitted inmates to be strip searched on the assumption that they may be in possession of contraband is illegal." *Id.* at 113. With regard to arrestees being admitted to the jail, "reasonable suspicion of possession of contraband must be determined on a case-by-case basis. *Therefore, many arrestees accused of nonviolent misdemeanors are excluded from strip searches.*" *Id.* (emphasis added).

2. Further, as petitioner explains, the majority of Americans live in states that prohibit suspicionless strip searches. Pet'r Br. 15-17 (discussing state laws); *id.* at 15 n.6 (listing state statutes); *see also* 37 Tex. Admin. Code § 265.2(b) ("When facility personnel reasonably believe it to be necessary, inmates should undergo a thorough strip search for weapons and contraband which may pose a threat to the security or safety of the facility."); Wis. Stat. Ann. § 968.255(2)(d) (strip searches permissible only where arrest is for felony or specific class of misdemeanors or minor offenses where there is probable cause the individual is concealing contraband). Notably, some jurisdictions have explicitly adopted the ACA standards discussed above. *See* Mont. Admin. R. 20.27.238(2) ("Facility policy, procedure and practice [for private institutions] must require that all pat searches, frisk searches, strip searches and body cavity searches are performed in accordance with ACA standards.").

Local officials also are advised to adopt suspicion-based strip-search policies. A publication of the National Institution of Corrections co-authored by *amicus curiae* Mark Martin provides a checklist to help ensure that "the jail's policy prohibit[s] the blanket strip search of all arrestees and allow[s] their strip search only based upon reasonable suspicion that the arrestee is concealing contraband." Mark D. Martin & Paul Katsampes, Nat'l Inst. of Corr., *Sheriff's Guide to Effective Jail Operations* 50 (2007).

In light of this consensus, *amici*'s view is that requiring strip searches to be based on reasonable suspicion would have minimal impact on most correctional institutions, while at the same time improving corrections administration for those facilities that have not adopted reasonable and best practices.

C. Use Of A Reasonable-Suspicion Standard Has Not Led To An Increase In Security Or Health Problems

1. The successful operation of facilities using a reasonable-suspicion standard and other less intrusive search methods rebuts hypothetical security concerns unsupported by evidence. The elimination of suspicionless strip-search policies has not resulted in increases in disease, gang activity, or contraband. To be sure, at one time many jail administrators assumed that suspicionless strip searches were necessary. A report by the Department of Justice and the National Institute of Corrections (authored by *amicus curiae* William Collins), for example, noted that before the adoption of a reasonable-suspicion standard for strip searches in jails around the country, many correctional officials "passionately believed that not being able to strip search all arrestees entering the jail would result in major security problems because of dramatic increases in contraband entering the jail." William C. Collins, Nat'l Inst. of Corr., *Jails and the Constitution: An Overview* 28 (2d ed. 2007). After assessing the shift to suspicion-based polices, however, the report concluded that "these problems did not develop. The legal rulings did not cause the catastrophe many predicted." *Id.* at 29.

This also is borne out by the experience of jail administrators. In an article published in the Correctional Law Reporter, a former jail administrator described many jail administrators' unfounded assumption that suspicionless strip searches will reduce contraband. Based on his experience and discussions with other administrators, however, he found that "[w]e really have not seen an increase in the

entry of contraband in those facilities that use a constitutionally valid strip search policy. I defy any jail administrator to 'show me the money' (actually the data) that their policy led to an increase in contraband entering through the initial booking process." Don Leach, *Arrestee Strip Searches: An Administrator's View*, Corr. L. Reporter, June-July 2010, at 13.

This view is consistent with the experiences of *amici*. For example, David Parrish, former administrator of the Hillsborough County Jail, a 4,000-bed facility in Florida, long believed in routine, suspicionless strip searches for all arrestees admitted to his facility. After implementing a reasonable-suspicion standard, however, Mr. Parrish—who reviewed each day's incident reports in the jail he administered for twenty-seven years—witnessed no increase in the amount of contraband smuggled into the jail. Other *amici* have had similar experiences.

2. Assessments of facilities that have transitioned from suspicionless to suspicion-based strip-search policies suggest an obvious explanation for the lack of increased contraband: individuals arrested for minor offenses are *de minimus* sources of contraband. From 1993 to 1998, officers at the Nassau County Correctional Center strip searched all new admittees. *See* Resp't Br. Opp'n Cert., *Nassau County v. Shain*, 537 U.S. 1083 (2002) (No. 02-541), 2002 WL 32135398, at *7.. Out of approximately 75,000 strip searches conducted during this period, only sixteen searches (0.02%) were shown to uncover contraband or weapons. On three occasions, items were retrieved from the admittee's body or body cavity. But in all three cases, the admittee had a drug or felony history that would have justified a strip search under the

reasonable-suspicion standard. *Id.* at *7-8. In the other thirteen searches, the contraband was found in or on the shoes or outer clothing; thus, a pat-down or clothing search would have sufficed. *Id.* at *8. Accordingly, out of 75,000 strip searches of new admittees during a five-year period, the county "could not point to even one case where a strip search performed without colorable suspicion was required to uncover a weapon or other contraband from a body or body cavity." *Id.*

Similarly, the district court in *Dodge v. County of Orange* examined data from approximately 23,000 bookings over a four-year period in the Orange County Correctional Facility (OCCF), a large jail outside New York City. 282 F. Supp. 2d 41, 69 (S.D.N.Y. 2003). The court uncovered only one instance (0.004%) where contraband would have entered the jail had the arrestee not been strip searched where there arguably was no reasonable suspicion. *Id.* at 69-70. "As these statistics demonstrate, it is simply not true that there was any dramatic increase—or any increase at all—in the amount of contraband at OCCF or in the amount that was recovered at Booking and Receiving (and thus, hypothetically, could have come from new arrivals) after the *Dodge* injunction [imposing the reasonable-suspicion standard] was entered." *Id.* at 65.

As the dissent below explained, other federal lawsuits involving strip-search policies like the ones at issue here have not resulted in a single documented example of anyone concealing contraband during arrest for a minor offense with the intent of smuggling contraband into the jail. Pet. App. 30a (Pollak, D.J., dissenting) (discussing *Bull* and *Powell* cases).

The dissent's observation is consistent with *amici*'s experience in state and local facilities. *Amicus curiae* Robert Reardon, who is the current Director of Corrections in Lafayette County, Louisiana and who previously administered the Hennepin County Jail in Minneapolis, Minnesota, did not observe any increase in the amount of contraband being smuggled into the Hennepin County Jail when it transitioned from a suspicionless strip-search policy to one based on reasonable suspicion. In fact, after more than twenty years in corrections, Mr. Reardon has never once observed an incident of the type that concerned the court of appeals below—*i.e.*, a situation in which an incarcerated person "induc[es] or recruit[s] others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband" into a jail. Pet. App. 23a. That is true even though Hennepin County suffered from a serious gang problem at the time Mr. Reardon administered the jail there, countering the panel majority's speculation that the "presence of gangs" in New Jersey jails increases the risk of individuals purposefully subjecting themselves to arrest in order to stow contraband such as weapons or drugs. *Id.* at 20a.

D. Experience Shows That A Strip-Search Policy Grounded On Reasonable Suspicion Is Superior To A Blanket Policy Of Strip Searching All New Admittees

Collectively, *amici* have hundreds of years of experience conducting or overseeing strip searches, monitoring contraband found during strip searches, and setting the policies governing contraband and strip searches. Yet none of the *amici* ever observed a single incidence of an incarcerated person "inducing or recruiting others to subject themselves to arrest on

non-indictable offenses to smuggle weapons or other contraband." Pet. App. 23a. In light of this fact, and for the reasons that follow, *amici* believe that a strip-search policy grounded on reasonable suspicion is reasonable and effective.

First, strip searches based on reasonable suspicion promote correctional diligence and ensure that limited resources are properly allocated to focus attention on individuals who present the greatest risk. Strip searches are resource intensive. In *amici*'s experience, a single strip search can take at least five minutes, and significantly longer if the individual being searched is not cooperative. The process requires at least one officer to be present, but many facilities—such as the one formerly administered by *amicus curiae* Jim Hart in Tennessee—require that two officers be present during a strip search. One officer conducts the search and the other protects the safety of the searching officer and serves as a witness. This is a time-intensive process that detracts from officers' availability to attend to other tasks, which is a significant consideration in resource-deprived jails.

Further, strip searches "are not fun tasks" for corrections officials. Leach, *supra*, at 14. Thus, mandatory strip searches often are assigned to the most junior, inexperienced officers. In the experience of *amici*, the sheer volume of searches can cause even the most conscientious officer to become less thorough.

By contrast, when a jail implements a reasonable-suspicion strip-search policy, it forces corrections officers to justify and, in most cases, document the reasons for the strip search. Such a policy imbues the strip-search procedure with a heightened sense of

importance and forces the officer conducting the search to focus on the reasons necessitating the strip search of an arrestee. The officer conducting the search therefore will be able to utilize the institution's scarce resources on those arrestees that, in the officer's professional judgment, require the most scrutiny.

Second, blanket search policies "over-correct" for a problem that exists in only the rarest of cases. Individuals who are arrested for minor offenses—such as the minor charge for which petitioner was arrested—usually lack advance notice of the arrest, and thus have no opportunity to hide contraband. Similarly, "one who is arrested for an outstanding parking ticket is much less likely to be carrying a dangerous weapon than is one who is arrested for an armed robbery." Robin Lee Fenton, Comment, *The Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders*, 54 U. Cin. L. Rev. 175, 185-86 (1985). In *amici*'s collective experience, it is highly unlikely that a person arrested for a misdemeanor or traffic violation will try to smuggle contraband or weapons into a correctional facility. Even more unlikely is the prospect that a person would purposefully subject themselves to arrest with the aim of bringing in contraband.

To the contrary, "the majority of contraband enters in two primary ways: community released inmates and staff." Leach, *supra*, at 13; *accord* William R. Bell, *Practical Criminal Investigations in Correctional Facilities* 8-14 (2002) (listing ways contraband enters a facility and not including intentional arrest for a minor offense); *Prison and Jail Administration* 76-77 (Peter M. Carlson & Judith Simon Garrett eds.,

1999) (stating that "most serious contraband such as drugs is introduced by inmate visitors," and not listing intentional arrest for a minor offense as a method of introducing contraband).

Third, even assuming that a person would theoretically subject themselves to arrest solely as a means to smuggle contraband, a "pat search" will uncover the vast majority of contraband. Pat or "frisk" searches are those in which "jail staff touch and feel the inmate's fully clothed body to detect contraband . . . . Pat searches are the least intrusive type of search and may be conducted on a routine and random basis to maintain security and control." *Resource Guide for Jail Administrators*, *supra*, at 113.

In *amici*'s experience, pat searches and the use of metal detectors are extremely effective in discovering contraband. In cases where reasonable suspicion is a close question, the use of a pat search often will provide the basis for reasonable suspicion (either due to the discovery of weapons or contraband or suspicious behavior during the pat search).

Finally, the reasonable-suspicion standard is both effective and easily implemented. It allows law-enforcement officers to assess whether a strip search is necessary in a given case, drawing on their training and experience. As this Court has emphasized, when assessing reasonable suspicion, law-enforcement officers "make inferences from and deductions about the cumulative information available" and "draw on their own experience and specialized training" to analyze factors that "might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Many jurisdictions employ checklists to help properly determine whether rea-

sonable suspicion exists. For example, *amicus curiae* Paul Downing and other correctional and legal professionals developed a checklist to assist in determining reasonable suspicion for Indiana institutions. As Indiana is one of only three states with term limits for sheriffs, the checklist was designed to provide guidance for newly-elected and inexperienced sheriffs and has served this purpose well. In 2003, this checklist was provided to the Chief Jail Inspectors in those states with Jail Standards and Inspections programs. Jail administrators and correctional officers thus have the experience and tools to recognize the factors that create reasonable suspicion.

* * *

As corrections professionals, *amici* agree that corrections administrators should be accorded deference in the adoption and execution of policies and practices that in their judgment are needed to maintain institutional security. At the same time, "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Plata*, 131 S. Ct. at 1928-29. In this case, the record provides no support for policies that undisputedly imposes a dramatic intrusion on personal privacy—especially since corrections professionals have rejected such policies and corrections institutions have successfully instituted less intrusive policies that are more effective. Accordingly, the reasonableness scale tips decidedly against the strip-search policies and practices at issue in this case.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX OF *AMICI CURIAE*

William C. Collins has nearly forty years of corrections experience, including as a former Senior Assistant Attorney General for Washington State where he was in charge of the Corrections Division and served on the Corrections Standards Board, an agency responsible for developing standards for the jails and prisons throughout the state. Mr. Collins currently is a lawyer and consultant who advises the National Institute of Corrections and has served on numerous committees of the American Correctional Association (ACA), including its Standards Committee. He has published extensively on corrections law and practice.

Paul E. Downing has over twenty years of corrections experience, including as the former Director of Detention Services for the Indiana Department of Corrections and as a Detention Inspector responsible for the inspection and certification of detention facilities in Indiana. He is the past Chair of the Indiana Jail Standards Committee and past regional director of the National Jail Inspectors' Association. Mr. Downing currently is a consultant with DLZ Indiana, LLC, which provides assistance to Indiana county jails and other institutions.

Robert J. Hall, Jr. has over thirty years of corrections experience and is the current Captain–Jail Administrator of the Grand Traverse County Sheriff's Office in Michigan, responsible for all operations of the 194-bed county jail. He is a Certified Jail Manager with the American Jail Association and has developed training programs for law enforcement agencies in eight Michigan counties. Captain Hall

also assisted in the development of the ACA *Core Jail Standards*.

James M. Hart has over thirty-five years of corrections experience, including as the former Jail Administrator for a 489-bed county jail in Chattanooga, Tennessee, and as the Commanding Officer at the 150-bed Marine Corps Brig at Quantico, Virginia. Mr. Hart is a Past President of the American Jail Association and previously served on the ACA Board of Governors. He serves on the ACA Policy and Resolutions Committee and currently is a jail management consultant for Tennessee's ninety-five counties. He also served as a member of the committee that developed the ACA *Core Jail Standards*.

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Mark D. Martin has over thirty years of corrections experience, including as the former chief of the

Nebraska Jail Standards program. He has provided technical assistance and consultation to state, local, and tribal jurisdictions in over forty states, has published extensively with the National Institute of Corrections, and has developed model jail policies, training programs and correctional standards. Mr. Martin currently is president of a corrections consulting company and serves on the Advisory Committee to the ACA Design Guide for Adult Local Detention Facilities.

Rod Miller has forty years of corrections experience, including as President of Community Resources Services, Inc., a non-profit that provides training and other services relating to prison and jail administration. He has provided jail training and planning assistance for institutions across the country and has published extensively on corrections issues. Mr. Miller participated in the development of the ACA *Core Jail Standards* and the ACA *Performance-Based Standards for Adult Local Detention Facilities*.

David M. Parrish has over thirty years of corrections experience, including as the former Commander of the Department of Detention Services for the Hillsborough County Sheriff's Office in Tampa, Florida, where he was responsible for an accredited 4,190-bed jail system. He is a Past President of the American Jail Association and chaired the Jail Managers' Certification Commission. He currently is a consultant on numerous jail-related matters. Mr. Parrish is the recipient of the ACA's highest recognition, the E.R. Cass Award, and he participated in the development of the ACA *Performance-Based Standards for Adult Local Detention Facilities*.

Robert J. Reardon has over twenty years of corrections experience and currently is the Director of Corrections of Lafayette Parish Sheriff's Office in Lafayette, Louisiana, where he oversees a 1,350-bed county jail. Director Reardon is a former Regional Training Initiative Member with the National Institute of Corrections.

AMICUS CURIAE BRIEF

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

—v.—

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF FORMER ATTORNEYS GENERAL OF NEW JERSEY ROBERT J. DEL TUFO, DEBORAH T. PORITZ, JOHN J. FARMER, JR., PETER C. HARVEY AND ZULIMA V. FARBER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The Attorney General of New Jersey is the State's highest-ranking law enforcement officer. As former Attorneys General of New Jersey, *amici curiae* were charged with maintaining the balance between civil liberties and effective law enforcement throughout the State.

Robert J. Del Tufo served as Attorney General of New Jersey from 1990 to 1993, during which time the Office of the Attorney General issued guidelines for strip searches that remain in effect today and are consistent with the District Court's decision in the present case. *See infra* at 5. Mr. Del Tufo is currently of Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. Deborah T. Poritz served as Attorney General of New Jersey from 1994 to 1996 and as Chief Justice of the New Jersey Supreme Court from 1996 to 2006, and is currently Of Counsel at Drinker Biddle & Reath LLP. John J. Farmer, Jr., served as Attorney General of New Jersey from 1999 to 2002 and is currently the Dean of Rutgers School of Law. Peter C. Harvey served as Attorney General from 2003 to 2006 and is currently a Partner at Patterson Belknap Webb & Tyler LLP. Zulima V. Farber served as Attorney General during 2006 and is currently a member of the firm of Lowenstein Sandler P.C.

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As former Attorneys General of New Jersey, *amici* recognize that "[a] detention facility is a unique place fraught with serious security dangers," and that law enforcement officers must conduct strip searches in some instances to prevent "smuggling of money, drugs, weapons, and other contraband" into jails. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). At the same time, "we do not underestimate the degree to which [strip] searches may invade the personal privacy of inmates." *Id.* at 560.

Amici submit that the District Court's decision in this case, unlike the Third Circuit's opinion, struck the proper balance between the substantial law enforcement interest in jail security and the substantial privacy interest in avoiding unnecessary strip searches. The District Court held, consistent with the overwhelming majority of federal courts, that the blanket strip search policies of the Burlington County Jail and Essex County Correctional Facility violate the Fourth Amendment. *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, 595 F. Supp. 2d 492, 504 (D.N.J. 2009).[2] The District Court's approach, focusing on reasonable suspicion, was

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[2] *See also Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984).

appropriate. Specifically, the District Court's decision required reasonable suspicion to conduct a strip search of a person arrested for a non-indictable offense. That focus on reasonable suspicion was not only consistent with case law, but was also consistent with New Jersey law, Attorney General of New Jersey's Strip Search Requirements, American Bar Association standards, and the laws of numerous states that restrict conduct of strip searches without reasonable suspicion. Accordingly, the judgment of the Third Circuit, which, despite acknowledging the intrusiveness of the search, rejected a reasonable suspicion standard and held that blanket strip search policies are not unreasonable under the Fourth Amendment, should be reversed.

Indeed, a policy of strip searching every detainee including, as the District Court put it, a "hypothetical priest or minister arrested for allegedly skimming the Sunday collection," *id.* at 512, contributes little to jail security and creates an intolerable risk of subjecting arrestees to needless humiliation. The reasonable suspicion standard, on the other hand, places stock in law enforcement officers' experience and observations and ensures that such strip searches can occur when there are legitimate security reasons for so doing. The District Court's narrow holding in this case would permit a strip search when the charges (such as felonies, drug crimes, and gun crimes) suggest the presence of contraband or when circumstances otherwise create reasonable suspicion. 595 F. Supp. 2d at 505; *see infra* pp.

18-20. These standards protect personal privacy without undermining jail security.

ARGUMENT

I. THE JAIL STRIP SEARCH POLICIES BEFORE THIS COURT VIOLATE NEW JERSEY LAW, STATE-WIDE REGULATIONS AND OTHER WIDELY-ACCEPTED STANDARDS.

The State of New Jersey has, in essence, already weighed in on the issue before the Court, passing legislation in 1991 to address the circumstances under which officers at adult county correctional facilities can (and cannot) strip search arrestees. The standards set forth in that legislation closely mirror the approach of the District Court.[3]

Pursuant to N.J. Stat. 2A:161A-1, persons who have "been detained or arrested for commission of an offense other than a crime shall not be subjected to a strip search" unless (1) authorized by a warrant or consent, (2) a recognized exception to the warrant requirement exists and there exists probable cause that a weapon, drug, or evidence of a crime will be found, or (3) the person is confined in a municipal

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[3] While a search in violation of state law does not result in a per se violation of the Fourth Amendment, *Virginia v. Moore*, 553 U.S. 164, 168, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), the focus on "reasonable suspicion" in the New Jersey statute is consistent with Fourth Amendment jurisprudence. *See* Point II *infra*.

detention facility or an adult county correctional facility and there exists reasonable suspicion that a weapon, drug, or contraband will be found.

New Jersey Stat. 2A:161A-8(b) required the Attorney General of New Jersey to issue guidelines for law enforcement officers "governing the performance of strip and body cavity searches." N.J. Stat. 2A:161A-8(b). Pursuant to this statutory mandate, in 1993, the Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers ("Attorney General's Strip Search Requirements") were issued.[4] The Attorney General's Strip Search Requirements permit strip searches of arrestees in municipal detention facilities only in the limited circumstances delineated in the statute. Attorney General's Strip Search Requirements § II.B.1.

Similarly, New Jersey Stat. 2A:161A-8(a) required the Commissioner of the Department of Corrections, after consultation with the Attorney General, to promulgate regulations "governing strip and body cavity searches of persons detained in ... adult county correctional facilities." *Id.* Consistent with that requirement, the Department of Corrections promulgated N.J.A.C. 10A:31-8.4, which authorizes searches of those confined for offenses other than crimes only when:

> 1. The search is authorized by a warrant or valid documented consent;

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[4] The Attorney General's Strip Search Requirements are available on the State of New Jersey's website, at www.state.nj.us/lps/dcj/agguide/3strpsch.pdf.

2. A recognized exception to the warrant requirement exists and the search is based on probable cause that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge;

3. The person is lawfully confined and the search is based on a reasonable suspicion that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found, and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; or

4. Emergent conditions prevent obtaining a search warrant or authorization of the custody staff supervisor in charge and such emergent conditions require custody staff to conduct a strip search in order to take immediate action for purposes of preventing bodily harm to the officer, person or others.

N.J.A.C. 10A:31-8.4.

To ensure that strip searches occur only under the prescribed circumstances, both the Department of Corrections regulations and the Attorney General's Strip Search Requirements

also impose reporting obligations on those conducting searches. Both the regulations and the Requirements mandate that the authorized person who performs the strip search file a written report that includes "[a] statement of facts indicating the reasonable suspicion or probable cause for the search." N.J.A.C. 10A:31-8.4(c)1; Attorney General's Strip Search Requirements § IV. The Department of Corrections regulations were readopted, effective July 6, 2010, and will remain in force until January 21, 2016. The Attorney General's Strip Search Requirements, last revised in 1995, remain in effect today.

The standards set forth by the Attorney General and Department of Corrections are actually more protective of personal privacy than is the District Court's decision. The Attorney General Strip Search Requirements place limitations on strip searches regardless of the reason for arrest, even if for a crime. The regulations promulgated by the Department of Corrections provide a different standard for strip searches of people confined for the commission of a crime than for people who are not, but strip-searches of both the former and the latter groups are limited. *See* N.J.A.C. 10A:31-8.4 (setting standards for those arrested or detained for commission of an offense other than a crime), N.J.A.C. 10A:31-8.5 (setting standards for those arrested or detained for the commission of a crime). The District Court's decision in this case would only limit strip searches of a person arrested for a non-indictable offense. Yet the fundamental focus of the New Jersey regulations

and of the District Court decision all rest appropriately on the "reasonable suspicion" standard.

The focus on reasonable suspicion in the District Court's decision and the New Jersey legislation and regulations echoes the same focus in the strip search laws of other states and in the standards of the American Bar Association.

Standards issued by the American Bar Association forbid strip searching arrestees without articulable suspicion:

> **Search of prisoners' bodies**
>
> (a) In conducting a search of a prisoner's body, correctional authorities should strive to preserve the privacy and dignity of the prisoner. Correctional authorities should use the least intrusive appropriate means to search a prisoner. Searches of prisoners' bodies should follow a written protocol that implements this Standard.
>
> * * *
>
> (d) Visual searches of a prisoner's private bodily areas, whether or not inspection includes the prisoner's body cavities, should:
>
> * * *

> (ii) be permitted only upon individualized reasonable suspicion that the prisoner is carrying contraband, unless the prisoner has recently had an opportunity to obtain contraband, as upon admission to the facility, upon return from outside the facility or a work assignment in which the prisoner has had access to materials that could present a security risk to the facility, after a contact visit, or when the prisoner has otherwise had contact with a member of the general public; *provided that a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit.*

American Bar Association, Legal Status of Prisoners Standards, Standard 23-7.9, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-7.9 (emphasis added).

Numerous other states have also enacted laws that limit strip searches of jail detainees accused of minor offenses, all of them fully consistent with the District Court's limited

holding. *See, e.g.*, Conn. Gen. Stat. 54-33*l* (a) ("No person arrested for a motor vehicle violation or a misdemeanor shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or contraband."); Tenn. Code. Ann. 40-7-119(b) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or other contraband."); Mo. Stat. Ann. § 544.193(2) ("No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband."); Iowa Code Ann. § 804.30 ("A person arrested for a scheduled violation or a simple misdemeanor shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband."); 725 Ill. Comp. Stat. Ann. 5/103-1(c) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance."); Ohio Rev. Code § 2933.32 (B)(1) ("A body cavity search or strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe

that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon ... that could not otherwise be discovered."); *see also* Va. Code Ann. § 19.2-59.1; Colo. Rev. Stat. § 16-3-405(1); Cal. Penal Code § 4030(f); Fla. Stat. 901.211(2); Mich. Comp. Laws 764.25a; Wash. Rev. Code. § 10.79.130.

The strip search policies of the Burlington County Jail and Essex County Correctional Facility, as described by the District Court, 595 F. Supp. 2d at 498-99, would therefore violate New Jersey law, Department of Corrections regulations, the Attorney General's Strip Search Requirements, the ABA Standards, and the state laws cited above. They would do so by compelling strip searches of every arrestee, regardless of whether reasonable suspicion exists. It was this very type of indiscriminate police conduct that the State of New Jersey sought to prevent.

II. THE REASONABLE SUSPICION STANDARD STRIKES THE PROPER BALANCE BETWEEN PRIVACY AND JAIL SECURITY, AS THE STANDARD BOTH PRESERVES AUTHORITY TO CONDUCT SEARCHES IN APPROPRIATE SITUATIONS AND PREVENTS NEEDLESS HUMILIATION.

A. Requiring Reasonable Suspicion for Strip Searches Does Not Compromise Jail Security.

In *amici*'s view, the reasonable suspicion standard strikes the appropriate balance between the substantial law enforcement interest in jail security and the substantial invasion of privacy caused by strip searches. While respondents contended below that requiring reasonable suspicion will undermine jail security, such fears are overstated. As noted above, it was not the position of the Attorney General of New Jersey, nor was it our experience during our respective terms as Attorney General of New Jersey, that requiring reasonable suspicion for strip searches created a significant and undue security threat.

As explained by a leading authority on jail security in a United States Department of Justice publication:

> [I]t is easy to exaggerate a possible security threat. Several years ago, the standard practice in jails was to strip search every arrestee at the time of booking, regardless of who the arrestee was, what the arrest

> was for, or the behavior of the arrestee. The ostensible reason for this practice was to prevent the introduction into the jail of drugs or weapons that had not been discovered through routine pat searches.
>
> In a series of lawsuits around the country, no jail was able to convince a court that persons arrested for minor offenses, such as unpaid traffic tickets or other minor misdemeanors were likely enough to be carrying contraband around in a body cavity to constitutionally justify this type of search. Officials passionately believed that not being able to strip search all arrestees entering the jail would result in major security problems because of dramatic increases in contraband entering the jail.
>
> *However, these problems did not develop. The legal rulings did not cause the catastrophe many predicted.*

William C. Collins, National Institute of Corrections, United States Department of Justice, *Jails and the Constitution: An Overview* 28-29 (2d ed. 2007) (emphasis added), *available at* nicic.org/Downloads/PDF/Library/022570.pdf.

As discussed below, requiring reasonable suspicion did not cause the sky to fall for at least

four reasons. First, the reasonable suspicion standard places stock in the training and experience of law enforcement officers. Second, in some cases, the nature of the charges creates reasonable suspicion *per se*. Third, where reasonable suspicion does not exist, non-strip searches suffice to maintain jail security. Fourth, arrest generally comes as a surprise, limiting opportunities to conceal contraband.

1. The Reasonable Suspicion Standard Gives Appropriate Weight to the Training and Experience of Law Enforcement Officers.

The reasonable suspicion standard allows law enforcement officers to assess whether a strip search is necessary in a given case, drawing on their training and experience. Courts assessing reasonable suspicion allow law enforcement officers to "make inferences from and deductions about the cumulative information available" and to "draw on their own experience and specialized training" to analyze factors that "'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *State v. Davis*, 517 A.2d 859, 865 (N.J. 1986) ("The evidence collected by the officer is seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. A trained police officer draws inferences and makes deductions ... that might well elude an untrained person. The

process does not deal with hard certainties, but with probabilities.") (quotations omitted).

When assessing whether reasonable suspicion exists to strip search a jail detainee, courts consider a range of factors such as "the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber*, 804 F.2d at 802. The New Jersey Supreme Court has explained the reasonable suspicion standard as follows:

> [A]pplication [of the reasonable suspicion standard] is highly fact sensitive and, therefore, not readily, or even usefully, reduced to a neat set of legal rules. Facts that might seem innocent when viewed in isolation can sustain a finding of reasonable suspicion when considered in the aggregate, so long as the officer maintains an objectively reasonable belief that the collective circumstances are consistent with criminal conduct.

State v. Nishina, 816 A.2d 153, 159 (N.J. 2003).

The extensive set of factors that may inform a finding of reasonable suspicion in the current context includes "the effect of intermingling the detainee with the larger prison population, the nature of the crime charged, characteristics of the detainee, lack of information about the detainee, criminal record, and period of time before a search where officials did not find any security concerns presented by the detainee,

as well as whether officials could have performed less intrusive alternatives." Gabriel M. Helmer, Note, *Strip Searches and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. Rev. 239, 283 (2001) (citing *Wachtler v. County of Herkimer*, 35 F.3d 77, 81 (2d Cir. 1994); *Watt v. City of Richardson*, 849 F.2d 195, 198 (5th Cir. 1988); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958-59 (6th Cir. 1987); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984)).

Indeed, a reasonable suspicion standard is a very low burden, especially compared to other Fourth Amendment safeguards such as the warrant requirement or a showing of probable cause. As one court noted in a strip search case, "[r]easonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress ..." *Spear v. Sowders*, 71 F.3d 626, 631 (6th Cir. 1995).

Courts have found that jail officials satisfied reasonable suspicion and properly conducted strip searches in a range of cases. For example, in *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045-46 (7th Cir. 1995), the plaintiff was strip searched after committing a traffic offense, and the court found reasonable suspicion because an officer thought he saw the plaintiff conceal

something. Similarly, in *Doe v. Balaam*, 524 F. Supp. 2d 1238, 1243-44 (D. Nev. 2007), the Court held that the authorities had reasonable suspicion to strip search a man arrested for misdemeanor destruction of property because he had a rolled up sock in his clothing. *See also Justice v. City of Peachtree*, 961 F.2d 188, 194 (11th Cir. 1992) (finding reasonable suspicion to strip search detainees because, among other reasons, an arrest occurred in an area where drinking and drug activity regularly took place, and an officer saw one arrestee hand an object to another arrestee); *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007) (holding that law enforcement officers had reasonable suspicion to conduct a strip search because the defendant fit the description of a person just involved in a drug deal and the police officer observed the defendant drop a bag of marijuana); *Cea v. O'Brien*, 161 Fed. Appx. 112, 113 (2d Cir. 2005) (finding reasonable suspicion to strip search a woman who was in an agitated state after refusing to surrender a handgun); *Bradley v. Village of Greenwood Lake*, 376 F. Supp. 2d 528, 536 (S.D.N.Y. 2005) (finding reasonable suspicion to strip search arrestee where, among other factors, an informant said that the arrestee possessed heroin).

2. In Some Cases, the Charges Against An Arrestee Create Reasonable Suspicion *Per Se*.

The nature of some charges may create reasonable suspicion *per se*, regardless of any other particularized facts. Indeed, the District Court's decision does not limit the authority of jail officials to conduct strip searches when an arrestee is charged with a misdemeanor that involves weapons, drugs, or violence, or with any felony whatsoever – even when particularized suspicion does not exist. Specifically, the District Court noted that a prior decision from the same judicial district "reasoned that a policy that mandates strip searches for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such a policy contains an implicit recognition of a reasonable suspicion." 595 F. Supp. 2d at 505 (citing *Davis v. City of Camden*, 657 F. Supp. 396, 400-01 (D.N.J. 1987)). In this respect, the District Court's ruling affords law enforcement authorities even greater leeway than the Attorney General's Strip Search Requirements, which require reasonable suspicion even when an individual is charged with an indictable offense.[5]

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[5] Memorandum from Robert T. Winter, Director, Division of Criminal Justice, forwarding Attorney General's Strip Search Guidelines (stating that the Attorney General's Strip Search Guidelines apply to both indictable and non-indictable offenses), *available at* www.state.nj.us/lps/dcj/agguide/3strpsch.pdf. While *amici* do not necessarily agree that a *per se* rule allowing strip searches of all detainees charged with indictable offenses is

Like the District Court, other courts generally have held that there is no need for further factual analysis when the nature of the charges provides a categorical basis for suspicion and makes the search reasonable. Numerous courts have held that misdemeanor charges involving drugs, guns, weapons, or other contraband – as well as any felony charge – create reasonable suspicion *per se*. *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) ("It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates"); *Dufrin v. Spreen*, 712 F.2d 1084, 1089 (6th Cir. 1983) (strip search of female detainee justified where a detainee was arrested and formally charged for felonious assault); *Dubrowolskyj v. Jefferson County*, 823 F.2d 955, 958 (6th Cir. 1987) (strip search for detainee arrested for menacing held constitutional because the offense, although a misdemeanor, was associated with weapons); *Hicks v. Moore*, 422 F.3d 1246, 1252 (11th Cir. 2005) (finding reasonable suspicion based on battery charges); *Campbell*, 499 F.3d at 718 (finding reasonable suspicion based on possession of narcotics); *Davis*, 657 F. Supp. at 400 (suggesting that jails may adopt a "policy that permits only those persons arrested on felonies or on charges involving weapons or contraband to be searched without individualized suspicion"); Robin Lee Fenton, Comment, *The*

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constitutional, the District Court's decision is fully consistent with the case law described below.

Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders, 54 U. Cin. L. Rev. 175, 185-86 (1985) ("The reasonable scope of a search of a misdemeanant who has been brought into the station house should be more limited because one who is arrested for an outstanding parking ticket is much less likely to be carrying a dangerous weapon than is one who is arrested for an armed robbery.").[6]

3. Less Intrusive Searches Maintain Jail Security When Reasonable Suspicion Does Not Exist.

When reasonable suspicion does not exist based on the particular circumstances, and when the nature of the charges does not create reasonable suspicion *per se*, law enforcement officers would still have the authority to conduct non-strip searches. Nothing in the District Court's decision or the Attorney General's Strip Search Requirements limits non-strip searches, and such searches provide an important means of maintaining jail security, even when the reasonable suspicion standard cannot be met.

First, officers may conduct a pat-down search upon arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to

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[6] *But see Way v. County of Ventura*, 445 F.3d 1157, 1162 (9th Cir. 2006) (finding a strip search unreasonable where an arrestee was booked on misdemeanor charges for being under the influence of a controlled substance).

search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (stating that upon lawful arrest, police officers may make a "full search of petitioner's person"). *See also* ABA Standard 23-7.9(c)(acknowledging the use of patdown searches but noting that they "should be brief and avoid unnecessary force, embarrassment, and indignity to the prisoner.")

Second, metal detectors may provide a less intrusive means of identifying contraband. *See Kelsey v. Cty. of Schoharie*, 567 F.3d 54, 70 (2d Cir. 2009) (Sotomayor, J., dissenting) (stating that jail's "clothing exchange" procedure violates the Fourth Amendment because other jail policies "allow[ ] pat searches and searches with a hand-held metal detector upon intake").

Third, jail officials may conduct random searches of pretrial detainees' cells in order to preserve institutional security and uncover contraband. *Bell*, 441 U.S. at 557 ("No one can rationally doubt that room searches represent an appropriate security measure ... Detainees' drawers, beds, and personal items may be searched ..."); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (upholding jail's policy of conducting "irregular or random 'shakedown' searches of the cells of detainees while the detainees are away at meals, recreation, or other activities").

4. Arrest Generally Comes as a Surprise, Limiting Opportunities To Conceal Contraband.

Requiring reasonable suspicion to conduct strip searches during booking also will not undermine jail security because arrestees generally have limited opportunities to hide contraband on their person. As the District Court stated, "most arrests are a surprise to the arrestee. Such a surprise does not give the arrestee an opportunity to plan a smuggling enterprise." 595 F. Supp. 2d at 509.

The District Court noted that strip searches following "planned contact visits" are "quite different from the instant matter" because such visits may not be a surprise, creating opportunities for advance planning. *Id* at 511. Given such opportunities for planning, the law enforcement interest in conducting a strip search is far greater after a planned visit than after an arrest.

The distinction drawn by the District Court is fully consistent with the weight of authority, which distinguishes between unexpected arrests and planned visits. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d at 111 (smuggling contraband is far less likely to occur during arrest than visitation because the suspect is handcuffed and arrest is unplanned); *Justice*, 961 F.2d at 192 (arrests for minor offenses are "quite likely to take that person by surprise") (quotation omitted).

The difference between visitation and arrest also separates this case from the Supreme Court's decision in *Bell v. Wolfish*, which addressed strip searches only after visitation. 441 U.S. at 558. Because arrest generally comes as a surprise, the overwhelming weight of authority holds that *Bell* does not countenance a blanket strip search policy during booking. *See Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) ("*Bell* authorized strip searches after contact visits, where contraband often is passed. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.") (citation omitted); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (stating that, in contrast to the visitation at issue in *Bell*, arrest and confinement are unplanned events), *overruled on other grounds by Hodgers-Durgin v. De la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Allison v. GEO Group, Inc.*, 611 F. Supp. 2d 433, 454 (E.D. Pa. 2009) (finding that because arrest and detention are generally "unplanned events," most arrestees have little opportunity to plan or carry out smuggling activities); *Thompson v. County of Cook*, 412 F. Supp. 2d 881, 890 (N.D. Ill. 2005) ("[I]t is a relatively safe assumption – at least in the absence of evidence to the contrary – that only a negligible portion of arrestees have concealed contraband in body cavities *prior to* their encounter with law enforcement.").

While the Eleventh Circuit has departed from the other Courts of Appeals in questioning the distinction between arrest and visitation and asserting that detainees may anticipate arrests, *Powell v. Barrett*, 541 F.3d 1298, 1313-14 (11th Cir. 2008) (en banc), it bears repeating that the current case involves non-indictable infractions, such as speeding, disorderly conduct, trespass, simple assault, and driving without insurance. Here, as in *Powell*, the assertion "that pretrial detainees booked on petty misdemeanor charges might anticipate their arrests ... is unwarranted speculation." *Id.* at 1318 (Barkett, J., dissenting).

Moreover, the limited instances when an individual expects to be arrested are no reason to jettison reasonable suspicion in all cases. After all, a voluntary arrest itself may help create reasonable suspicion in a given case, even when a detainee is charged with a misdemeanor unrelated to contraband or violence. *See Miller v. Yamhill County*, 620 F. Supp. 2d 1241, 1246 (D. Or. 2009) (reasonable suspicion existed to strip search individual who self-reported to jail where, among other factors, he anticipated being taken into custody and had been incarcerated at the same jail before).

The District Court's decision thus gives due weight to the law enforcement interests at stake in this case. The holding has no effect on post-visitation strip searches, allows strip searches based on reasonable suspicion or the nature of the charges, and does not limit the authority to maintain jail security through less intrusive

means, including pat-down searches, cell searches, and metal detectors.

B. Strip Searches Must Not Occur Without Justification Because They Cause a Severe Invasion of Personal Privacy.

Reasonable suspicion strikes the appropriate balance between privacy and jail security not only because the standard preserves authority to conduct searches in numerous situations but because it prevents humiliation through needless strip searches. The right to privacy has been described as "the right most valued by civilized men," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and the Supreme Court recently discussed the humiliation caused by a strip search in *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009):

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

> Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.

Id. at 2641.

The courts of appeals have without exception recognized the "feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers." *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135, 1136 n. 1 (9th Cir.) (*en banc*) (citation omitted), *cert. denied*, 79 U.S.L.W. 3594 (2011).[7] They have described strip searches in terms such as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission..." *Mary Beth G.*, 723 F.2d at 1272 (citation omitted)(internal quotation marks omitted). Strip searches have been said to constitute a "severe if not gross interference with a person's privacy," *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983) (Breyer, J.), an "extreme intrusion," and "an offense to the dignity of the individual," *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (citation omitted), and "[o]ne of the clearest forms of degradation in Western Society." *Canedy v.*

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[7] *See also id.* at 1143 ("[W]e have consistently recognized the frightening and humiliating invasion occasioned by a strip search, even when conducted with all due courtesy.") (citations omitted)(internal quotation marks omitted).

Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (alteration in original) (citation omitted).[8]

The accounts of those subjected to strip searches make clear the extraordinary humiliation and invasion of privacy this practice entails. Judith Haney, arrested at a political demonstration in Miami in 2003, described her experience:

> After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks [which] exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. . . . The guard's next set of instructions were to squat - and then - to hop like a bunny.

Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 Law and Contemp. Probs. 65, 67 (2008)(alteration in original). All charges against Haney were eventually dropped. *Id.* *See also Way v. County of Ventura*, 445 F.3d

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[8] *See also Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening"); *Justice*, 961 F.2d at 192 (same); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from [the] view of strangers ... is impelled by elementary self-respect and personal dignity").

1157, 1159 (9th Cir. 2006) (jail detainee forced to "spread her labia ... to allow a check of the vaginal area"); *Mary Beth G.*, 723 F.2d at 1267 (detainee forced to "squat two or three times facing the detention aide and to bend over at the waist to permit visual inspection of the vaginal and anal area").

Detainees subjected to strip searches have described the experience as "humiliating" and "shameful," *Kelsey*, 567 F.3d at 66 (Sotomayor, J., dissenting), and have been left "weeping on the floor" after such searches, *Lucero v. Donovan*, 354 F.2d 16, 19 (9th Cir. 1965). The effects are sometimes severe and long lasting. One district court described the consequences suffered by a young woman after being strip searched in order to visit her brother in prison:

> During the strip searches, Blackburn . . . panicked, perspired heavily and shook uncontrollably to the extent that she was barely able to stand. . . . Following the strip searches, Blackburn developed symptoms of post-traumatic stress syndrome. She regressed, becoming guilt ridden and depressed. She gained approximately forty pounds, had nightmares about the strip searches and had trouble sleeping. She also became phobic about sex. Shortly after the strip searches, Blackburn ended her sexual relationship. She stopped working, attempted suicide, and eventually dropped out of college, which she was within months of finishing. She never

> returned to school. . . . When she attempted to have sexual relations with [her husband] she experienced muscle spasms, rigidity and physical pain. The symptoms of sexual dysfunction continued throughout her marriage. She had never experienced these physical reactions prior to the strip searches.

Cole v. Snow, 586 F. Supp. 655, 666 (D. Mass. 1984), *aff'd sub nom. Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985). *Cole* is not an outlier; the federal courts are replete with testimonial examples of the psychological trauma caused by strip searches. *See, e.g., Lee v. Ferraro*, 284 F.3d 1188, 1192 (11th Cir. 2002) (plaintiff plagued by pervasive fear following a strip search causing depression and marital problems); *Simpson v. City of Maple Heights*, 720 F. Supp. 1306, 1310 (N.D. Ohio 1989) (plaintiff suffered vomiting, diarrhea, inability to sleep, eat, or swallow, and loss of self-esteem, self-worth, and self-dignity as a result of being strip searched).

A strip search "is a demeaning and humiliating experience for any human being, male or female."[9] But there is reason to believe

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[9] *Women in Prison: A report by the Anti-Discrimination Commission Queensland* 72 (2006). *See also* Michael S. Schmidt, *City Reaches $33 Million Settlement Over Strip Searches*, New York Times, March 22, 2010, http://www.nytimes.com/2010/03/23/nyregion/23strip.html?scp=1&sq=strip%20searches%20at%20Rikers%20Island&st=cse (thirty-nine year old man describes being "horrif[ied]" and "humiliated" when required to "squat and spread his buttocks" during strip search).

the practice may have a disproportionately harmful effect on women. One commentator has noted that many challenges to strip-search policies "allege that women are singled out for more invasive search procedures than men, perhaps because jail authorities believe that vaginal smuggling is easier (or more common) than anal smuggling, and therefore that there is a greater need for highly intrusive searches of women." Schlanger, *supra*, at 75 (footnotes omitted). In addition,

> women may well feel more harmed than men by a visual body-cavity search. After all, given the gender distribution of jail workforces, women arrestees may be more likely than men to have the search done or observed by someone of the opposite sex; they may be menstruating or pregnant, both conditions that may render searches particularly objectionable; and they may care more about bodily privacy than men.

Id. at 75-76 (footnotes omitted).

Moreover, women – particularly incarcerated women – have far higher rates of previous physical and sexual abuse than men. More than 50% of women detained in jails report being physically or sexually abused – a rate five times that of male jail detainees.[10] For a woman

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[10] Doris J. James, Bureau of Justice Statistics Special Report: Profile of Jail Inmates, 2002, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf. *See also* TERRY KUPERS, M.D., PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 114 (1999) ("Approximately 80 percent of women

who has been sexually abused, "strip searching can be more than a humiliating and undignified experience. In some instances, it can re-traumatize women who have already been greatly traumatized by childhood or adult sexual abuse." *Women in Prison*, *supra* n.9, at 72.[11]

The extreme invasion of personal privacy caused by a strip search may be necessary to maintain jail security where reasonable suspicion exists. Blanket policies, however, result in intrusions without justification, as in this case, where jail policies required officials to subject Mr. Florence to two strip searches in less than a week, forcing him to squat and cough while naked, and to open his mouth and lift his genitals in front of an officer sitting an arm's length away – all because Mr. Florence had been arrested, in error,

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behind bars have been the victims of domestic violence and physical or sexual abuse at some time prior to their conviction"); *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) (*en banc*) (noting the "shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the [female] inmates prior to their incarceration;" eighty-five percent of inmates at women's prison reported "a history of serious abuse . . . including rapes, molestations, beatings, and slavery").

[11] *See also* Louise Bill, *The Victimization . . . and . . . Revictimization of Female Offenders*, Corrections Today (1998) ("The powerlessness that most of these women already feel as the result of their previous abuse and exploitation is further exacerbated by the necessity to comply with [strip searches]"); Kupers, *supra* n.10, at 135 (humiliating treatment of incarcerated women can cause emotional disturbances and make postrelease adjustment difficult).

for a fine he already had paid. 595 F. Supp. 2d at 496-98. Allowing indiscriminate strip searches guarantees that similar needless searches will continue to occur. *See Mary Beth G.*, 723 F.2d at 1267 (blanket policy of strip searching all female misdemeanor arrestees); *Tinetti v. Wittke*, 479 F.Supp. 486, 488 (E.D. Wis. 1979) (strip search of woman arrested for speeding); Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. Marshall L. Rev. 273, 274 (1980) (noting that teachers in Wisconsin were strip searched after being charged with disorderly conduct during a strike).

Amici believe that the reasonable suspicion requirement correctly balances "the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559. The reasonable suspicion standard preserves the authority to conduct necessary strip searches while limiting needless humiliation.

CONCLUSION

For the reasons set forth above, this Court should hold that reasonable suspicion is required for jail officials to conduct a strip search, at least of those persons arrested for non-indictable offenses. As such, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, AND CALIFORNIA COALITION AGAINST SEXUAL ASSAULT IN SUPPORT OF PETITIONER

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BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, AND CALIFORNIA COALITION AGAINST SEXUAL ASSAULT IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its

The Domestic Violence Legal Empowerment and Appeals Project ("DV LEAP") was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court.

DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has regularly submitted *amicus* briefs to the Court in cases with potential consequences for victims of domestic violence. *See, e.g.*, *Robertson* v. *U.S. ex rel Watson*, 130 S. Ct. 2184 (2010); *Abbott* v. *Abbott*, 130 S. Ct. 1983 (2010); *United States* v. *Hayes*, 555 U.S. 415 (2009); *Giles* v. *California*, 554 U.S. 353 (2008); *Hammon* v. *Indiana*, 547 U.S. 813 (2006); *Davis* v. *Washington*, 547 U.S. 813 (2006); *Town of Castle Rock, Colo.* v. *Gonzales*, 545 U.S. 748 (2005). DV LEAP collaborates regularly with the domestic violence community on litigation and law reform initiatives and works closely with the George Washington University Law School and a network of *pro bono* law firms.

The National Clearinghouse for the Defense of Battered Women works to increase justice for victims

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counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

of domestic violence who are charged with or convicted of crimes. Founded in 1987, the National Clearinghouse provides specialized, case-specific technical assistance and information to battered defendants, defense attorneys, battered women's advocates, expert witnesses, and other professionals and community members. The organization is committed to ensuring that victims of battering who are charged with crimes receive the full benefit of all rights and protections that all defendants deserve, including fair and humane treatment throughout the criminal legal process.

The California Coalition Against Sexual Assault (CALCASA) has provided a unifying vision and voice speaking out against sexual violence in the State of California, nationally and internationally, since its inception in 1980. It began as a collaborative effort of rape crisis centers in California, which were among the first rape crisis centers in the nation. CALCASA works at the state and national level to bring justice and hope to victims and survivors of sexual assault and to support those who work to eradicate sexual violence. It seek to impact public policy, provide education, create systemic change, and ensure resources are available to those working to end sexual violence. CALCASA also works collaboratively with domestic violence and sexual violence coalitions around the country to support efforts to ensure appropriate advocacy on behalf of survivors, including through the judicial system.

The proper resolution of this case is a matter of concern to *amici*. Allowing a jail to strip search

every individual arrested for any offense—no matter how minor the offense, and no matter how little suspicion the individual raises with prison staff—would have particularly serious and traumatic consequences for the many, many women who have been victims of domestic violence or sexual assault. Statistics indicate roughly half of women in prison and a quarter of women in the general population fall into this category.

A strip search is unquestionably a dramatic invasion of a person's bodily integrity and security. It cannot be justified by an unsubstantiated governmental interest in avoiding contraband being smuggled into a prison. That is where the Court of Appeals erred. There is no evidence that strip searching women whom no one suspects have contraband and committed only a minor infraction will further a jail's desire to prevent smuggling of contraband into prison—but there is extensive evidence of the physically invasive and psychologically damaging effects of strip searches, especially for individuals who have been victims of domestic violence or sexual abuse.

ARGUMENT

I. ALLOWING SUSPICIONLESS STRIP SEARCHES OF INDIVIDUALS ARRESTED FOR MINOR OFFENSES WILL HAVE DEVASTATING CONSEQUENCES FOR VICTIMS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT.

There can be no question that a strip search is at once "demeaning," "humiliating," and "terrifying." *Mary Beth G.* v. *Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). This Court has recognized the uniquely invasive context presented by a strip search, cautioning that strip searches "instinctively give us the most pause." *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979). And while strip searches are highly intrusive to any person's privacy and dignity, they are especially traumatic for individuals who have been victims of domestic violence or sexual assault. Those individuals constitute a significant portion—statistics indicate one in four women is a domestic violence victim and close to one in five women is a rape victim—of the general population. *Infra*, at 9-10.

Researchers have documented the profound effects that strip searches can have on such victims, triggering a wide variety of negative psychological reactions. The psychological impact of strip searches is a particularly relevant consideration when dealing with women, because of the high rates of domestic violence, rape, sexual assault, and childhood sexual abuse reported by women among both the general population and especially the prison population.

A. Strip Searches Are Especially Intrusive And Traumatic For Victims Of Domestic Violence And Sexual Assault.

1. A strip search would be jarring for any person, but the "negative psychological impacts of strip searches are intensified" when they are carried out on those who have been physically, emotionally, or sexually abused. Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women's Prisons* in *The Violence of Incarceration* 107, 122 (Phil Scraton & Jude McCulloch eds., 2009). That is because a strip search will often re-victimize or re-traumatize a person who has been abused in the past. This can cause the victim to experience "the emotional intensity of the original trauma" all over again. Jan Heney & Connie M. Kristiansen, *An Analysis of the Impact of Prison on Women Survivors of Childhood Sexual Abuse*, in *Breaking the Rules: Women in Prison and Feminist Therapy* 29, 30-31 (Judy Harden & Marcia Hill eds., 1998).

Such re-victimization can be terrifyingly real. A strip search may cause an abuse victim, particularly those who suffer from post-traumatic stress disorder ("PTSD") as a result of their prior rape, abuse, or assault, to be re-traumatized. Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System* 8 (2003), *available at* http://www.stephaniecovington.com/pdfs/4.pdf. For these individuals, the strip search can trigger auditory and visual flashbacks to the previous abuse. Katherine Stuart van Wormer & Clemens Bartollas, *Women and the Criminal Justice System* 101 (2011); *Special Report on Female*

Offenders in Florida Prisons 18 (1999), *available at* http://www.doh.state.fl.us/cma/reports/femalereport1999.PDF. The abuse victim is therefore forced to process not only the humiliation and fear caused by a strip search, but also to relive their past abuses at the same time.[2]

2. For individuals with a history of abuse, the trauma induced by a strip search does not end with the search itself. A strip search often induces abuse victims to resort to coping or defense mechanisms as a means of self-protection. Lori B. Girshick, *Abused Women and Incarceration* in *Women in Prison: Gender and Social Control* 95, 105, 114-15 (Barbara H. Zaitzow & Jim Thomas eds., 2003). These self-protective coping mechanisms can include things like reacting to a strip search with aggression toward the officer or prison official conducting the search. *Id.* But such attempts at self-protection are likely to provoke physical or otherwise harsh responses from the prison official conducting the search and thereby make the strip search even more physically and psychologically difficult. *Id.*

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[2] Fear of sexual abuse during strip searches may increase this re-traumatization, particularly among survivors of abuse. A recent Bureau of Justice Statistics report analyzing the results of a national survey of prison and jail inmates highlighted that "[r]eports of staff sexual misconduct were linked to strip searches." Allen J. Beck *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* 24 (2010). In fact, the survey found that 30.8% of inmates who reported "sexual touching" by prison or jail staff reported that this touching occurred during strip searches. *Id.*

Strip searches can also trigger more severe coping mechanisms, such as self-injury and even suicide. *Id.* at 105; Heney & Kristiansen, *supra*, at 37. As one example, Paula Richardson, a twenty-three year-old inmate in an Australian prison, had been raped several months before her incarceration. Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness* 79 Fordham L. Rev. 2721, 2742 (2011) (citing McCulloch & George, *supra*, at 116-17). When Paula called her mother after a strip search, she was "inconsolable with distress." *Id.* Paula's prison records, as well as reports from prison officials and her parents, indicate that her mental state and behavior deteriorated following the strip search. *Id.* at 2742-43. Six weeks later, she hung herself with a shower curtain. *Id.* at 2743. Paula's situation is not unusual. *See, e.g., Jordan* v. *Gardner*, 986 F.2d 1521, 1539 (9th Cir. 1993) (citing expert testimony that intrusive searches of victims of prior abuse could lead to increased suicide attempts); *Special Report on Female Offenders in Florida Prisons*, *supra*, at 1-3, 24-25 (describing the circumstances of a woman inmate who had a prior history of sexual abuse, was strip searched several times while in prison, and ultimately committed suicide).

3. Courts have specifically acknowledged the traumatic effects of strip searches on victims of physical and sexual abuse. *See, e.g., N.G.* v. *Connecticut*, 382 F.3d 225, 239 (2d Cir. 2004) (Sotomayor, J., concurring in part and dissenting in part) (acknowledging that a strip search can be more traumatic for a child who has been the victim of

sexual abuse than it would be for other children). One case that involved significant expert testimony and fact-findings on these issues is *Jordan* 986 F.2d at 1525-26. That case involved the constitutionality of a policy allowing male prison staff to conduct clothed pat searches of female inmates. *Id.* at 1530-31. Although it involved a different factual context and a different constitutional challenge, the court's decision focused on the same sorts of psychological affects just detailed. *See id.* at 1525-26; *supra*, at 5-7.[3]

Specifically, in *Jordan*, numerous experts testified about the severe psychological impact that searches can have on abused women. *Id.* at 1525-26. One expert psychologist emphasized that the unwilling submission to bodily contact (even when clothed) would likely cause a woman with a history of abuse to feel re-victimized and result in a number of symptoms of post-traumatic stress disorder. *Id.* at 1526. Another expert psychologist testified that intrusive searches could lead to re-victimization, anxiety, depression, and possibly increased suicide attempts in women who are the survivors of male violence. *Id.* at 1539. And, a psychiatric social worker characterized the searches as an almost

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[3] Moreover, while Jordan involved male prison staff conducting pat searches of women inmates, research shows that strip searches can be traumatizing even when conducted by people of the same gender. *See, e.g.*, Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse* 88 Marq. L. Rev. 751, 787-88 (2005) (explaining that women detainees feel deeply humiliated even when female guards perform searches).

"unendurable psychological threat and stress" for those with a history of abuse. *Id.* at 1539-40.

The expert testimony presented in *Jordan* was corroborated by the testimony of several inmates. *Id.* at 1526. In particular, one of the inmates who had a long history of sexual abuse suffered extreme distress when she was subjected to a clothed pat search. *Id.* at 1523. The distress was so severe that she had to have her fingers pried loose from bars she had grabbed during the search and she vomited after returning to her cell. *Id.*

Other courts have similarly recognized the traumatic effect that strip searches (and pat searches) can have on victims of physical or sexual abuse. *See, e.g., N.G.*, 382 F.3d at 232 (citing expert testimony that a strip search would be especially severe for a child who has been the victim of sexual abuse); *Colman* v. *Vasquez*, 142 F. Supp. 2d 226, 232-33 (D. Conn. 2001) (citing the particular vulnerabilities of victims of sexual abuse as being "a crucial factor" in assessing the viability of plaintiff's claim concerning the constitutionality of cross-gender pat searches).

B. Victims Of Domestic Violence And Sexual Assault Make Up A Significant Portion Of The General Population And Women In Prison.

The privacy intrusion and negative psychological impact caused by strip searches on victims of domestic violence and sexual assault is not merely a hypothetical concern. Rape and sexual assault is far

more common than many people realize. Researchers estimate that roughly one in four women in the United States are physically assaulted by a partner or ex-partner in her lifetime. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, National Institute of Justice & the Centers for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (2000). In addition, about 18% of women—nearly one in five—report having been raped at some point in their lives. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. On the Judiciary* 2 (2010) (statement of Susan B. Carbon, Director of the Office on Violence Against Women).

These numbers are even higher among women arrested and imprisoned. According to the bipartisan National Prison Rape Elimination Commission, for example, studies have shown that 31% to 59% of female inmates reported having been sexually abused as children, while 23% to 53% reported having been sexually abused as adults. *National Prison Rape Elimination Commission Report* 71 (2009). Similarly, according to a Department of Justice Bureau of Justice Statistics investigation, 44% of female inmates reported having

been victims of physical and/or sexual abuse. Stuart van Wormer & Bartollas, *supra*, at 103-104.[4]

As these statistics make clear, given the sheer number of women in the general population who have suffered from physical abuse, rape, or sexual assaults, a policy that generically permits suspicionless strip searches of individuals arrested for minor offenses will affect many such survivors—causing extreme psychological harm to women caught up in minor offenses who raise no suspicion.

II. THERE IS NO GOVERNMENT INTEREST THAT OUTWEIGHS THE INTRUSIVENESS OF SUSPICIONLESS STRIP SEARCHES.

In the decision below, the Third Circuit held that strip searches of those who raise no suspicion and are involved in a minor offense (which would include such things as parking violations, moving violations, and vehicle equipment violations) are needed to prevent smuggling of contraband into prisons. *Florence* v. *Board of Chosen Freeholders*, 621 F.3d 296, 307-08 (3d Cir. 2010). That concern was unsupported by any record evidence. *Id.* at 309. The negative effects of strip searches on victims of domestic violence or sexual assault are all too real

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[4] These statistics may underreport the number of women in prison who have been abused. "Large, government-sponsored studies do tend to find rates of prior abuse among female inmates to be around 50%. However, other studies, typically using more in-depth research methods, find much higher rates." National Clearinghouse for the Defense of Battered Women, *Abuse History Among Incarcerated Women* 1 (2011) (citing studies).

and have been carefully researched and documented. The traumatic invasion of bodily integrity and personal security caused by suspicionless strip searches cannot be outweighed by a governmental interest which is unsupported and purely speculative. Pet. Br. 27-31.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

BRIEFS

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IN THE

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QUESTION PRESENTED

Whether the Fourth Amendment permits a jail to conduct a suspicionless search of every individual arrested for any minor offense no matter what the circumstances.

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INTEREST OF DRI[1]

Amicus curiae DRI—the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, DRI seeks to address issues germane to defense lawyers and the civil justice system. DRI has long been a voice for a fair and just system of civil litigation, seeking to ensure that it operates to effectively, expeditiously, and economically resolve disputes for litigants. To that end, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case stems from its members' need to advise local government clients regarding the rules for implementing strip searches in correctional institutions and the associated risk of litigation. DRI members are also involved in defending these local governments, many of whom are under severe financial strain, from burdensome, distracting, and time consuming litigation. DRI's concern is that moving from a bright-line rule of strip searching every individual as part of the process of entering the general prison or jail population to requiring jail personnel to search those arrested on a

1. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed written consent to the filing of *amicus* briefs pursuant to Rule 37.

misdemeanor only with a showing of reasonable suspicion, opens the door to profiling and other abuses of discretion and leaves local governments vulnerable to lawsuits on equal protection grounds. Additionally, because courts will be given discretion to review searches on a case-by-case basis under a reasonable suspicion standard, the resulting uncertainty in the law will increase the difficulty of advising clients on developing and implementing strip search policies that decrease the risk of litigation. DRI's members are involved in litigation in state and federal courts all over the country, and therefore, DRI is well-positioned to assist the Court by offering insight into the impact of the decision at issue here.

SUMMARY OF ARGUMENT

The Third Circuit in this case, as well as the Eleventh Circuit in *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc) and the Ninth Circuit in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) have correctly determined that a blanket policy of strip searching all arrestees admitted to a general jail population is reasonable under *Bell v. Wolfish*, 441 U.S. 520 (1979). All three cases recognize that *Bell* addressed a general policy, not individual searches. The visual body-cavity search policy at issue in *Bell* applied to all detainees, regardless of the crime committed, and it applied as well to some who did not commit any crime. The Supreme Court in *Bell* recognized the special security needs of correctional institutions, as well as the discretion traditionally afforded to prison administrators, and did not mandate individualized suspicion as a prerequisite for visual body-cavity searches.

In addition to addressing security and administrative concerns in prisons, a blanket strip search policy minimizes challenges to searches conducted by police and correctional officers that would undoubtedly be raised if they are forced to operate under a less-definite reasonable suspicion standard. Furthermore, when courts have the discretion to determine the reasonableness of these searches on a case-by-case basis, the calculus can be extremely complex, and the resulting uncertainty in the law makes it harder to develop and implement strip search policies that avoid the risk of litigation. The resulting litigation, moreover, will necessarily be based on a multiplicity of facts, making it harder to resolve at the motion stage. This means expensive, distracting and often unpredictable litigation with all its consequent problems is likely to increase.

Finally, and most importantly, this Court has approved the use of bright-line rules allowing searches in several situations in which government interests in performing a search outweigh any intrusion on an individual's privacy. In these situations, reasonable suspicion is not required, rather, individuals are searched based on their participation in an activity or membership in a class. The decisions announcing these bright-line rules recognize *amicus curiae* DRI's concern that implementing a reasonable suspicion standard is often impractical and the discretion it affords can result in abuse and unfairness to certain groups. Indeed, a correctional facility presents an even stronger case for dispensing with an individualized suspicion requirement than in most "special needs" cases in which this court already has done so.

ARGUMENT I

A BLANKET STRIP SEARCH POLICY IS REASONABLE AND THEREFORE CONSTITUTIONAL PURSUANT TO *BELL V. WOLFISH*.

A. Bell addressed a general policy applicable to all detainees and did not require individualized suspicion.

In *Bell*, this Court upheld the lawfulness of a policy that required visual body-cavity searches of all pretrial detainees after contact visits at the Metropolitan Correctional Center in New York City. *Bell v. Wolfish*, 441 U.S. 520, 523-524 (1979). The MCC is a federally operated short-term custodial facility in New York City designed to house pretrial detainees, as well as convicted prisoners and witnesses in protective custody. *Id.* The Court recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546. The Court also acknowledged that "[s]muggling . . . money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . and in other cases." *Id.* at 559. As a result, prison administrators should be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547.

In light of these considerations, this Court held that the visual body-cavity searches were reasonable and did not violate the Fourth Amendment. In so doing, the Court articulated a balancing test, wherein determining "reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559. Under this test, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

The Court's specific conclusion in *Bell* was that visual body-cavity inspections "as contemplated by the MCC rules" could be conducted on less than probable cause. 441 U.S. at 560. Leaving no doubt that a blanket strip search policy is thus constitutional, Justice Powell's dissent lamented that "at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case." *Id.* at 563 (Powell, J., dissenting).

B. Three federal circuits, including the Third Circuit in this case, have correctly determined that individualized suspicion is not required for the strip searches at issue here

Three federal circuits, including the Third Circuit in this case, have correctly determined that *Bell* does not require individualized suspicion for strip searches of all arrestees admitted to a jail's general population. In *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc), the Court held that, pursuant to *Bell*, a policy of strip searching all arrestees as part of the process of

booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible. Addressing the precedent set in *Bell*, the court explained, "[t]he security needs that the Court in *Bell* found to justify strip searching an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time." *Id.* at 1302. In fact, the court observed that any factual differences with intake searches were immaterial because, "an inmate's initial entry into a detention facility might be viewed as coming after one big and prolonged contact visit with the outside world." *Id.* at 1313. Further, the visual body cavity searches conducted in *Bell* "were more intrusive, and thereby impinged more on privacy interests" than the visual strip searches at issue in *Powell* and in this case. *Id.* at 1302.

The 11th Circuit also noted that the Supreme Court in *Bell* "addressed a strip search policy, not any individual searches conducted under it," and "[t]he Court spoke categorically about the policy, not specifically about a particular search or an individual inmate." *Powell*, 541 F.3d at 1307. In short, the policy at issue in *Bell* was a blanket policy, which "applied to all inmates, including those charged with lesser offenses and even those charged with no wrongdoing at all who were being held as witnesses in protective custody. The policy did not require individualized suspicion." *Id.* at 1307.

Similarly, in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), the court upheld the San Francisco jail system's policy requiring the

strip search of all arrestees who were to be introduced into the general jail population for custodial housing. *Id.* at 966, 975. The policy was implemented "[t]o address a serious problem of contraband smuggling in the jail system . . . ." *Id.* In a class action lawsuit challenging this policy on its face, the district court held that it violated the Fourth Amendment rights of the persons searched. *Id.* The district court certified a class under Federal Rule of Civil Procedure 23(b)(3) and defined the class as including all persons who "were arrested on any charge not involving weapons, controlled substances, or a charge of violence, and not involving a violation of parole or a violation of probation . . . and who were subjected to a blanket visual body cavity strip search . . .without any individualized reasonable suspicion that they were concealing contraband." *Id.* at 969.

Citing *Bell*, the Ninth Circuit recognized that "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*." *Bull*, 595 F.3d at 975. The court further acknowledged that "[t]he record reveals a pervasive and serious problem with contraband inside San Francisco's jails, as well as numerous instances in which contraband was found during a search . . . ." *Id.* Thus, "under *Bell*, San Francisco's strip search policy was reasonable and therefore did not violate the class members' Fourth Amendment rights." *Id.*

As did the 11th Circuit, the Ninth Circuit recognized that, in *Bell*, "[t]he Supreme Court did not require MCC officials to consider the individual characteristics of the persons subject to the strip search policy. Nor did the Court

require MCC officials to articulate their suspicions that a particular person subject to the policy was smuggling contraband." *Bull*, 595 F.3d at 978. Moreover, "*Bell* did not require MCC officials to modify the strip search policy based on whether a detainee had been charged with a serious or minor offense." *Id.* Thus, a blanket strip search policy applicable to all persons who had contact visits is "categorically reasonable" under the circumstances in the detention facility. *Id.*

Likewise in this case, the Third Circuit observed that "[b]ecause the scope, manner, and place of the [strip] searches" at issue were "similar to or less intrusive" than the visual body cavity searches in *Bell*, "the only factor on which Plaintiffs could distinguish this case is the Jails' justification for the searches." (Pet'r App. 20a). Of the reasons cited by the jails in justifying the searches, "the potential for smuggling of weapons, drugs, and other contraband poses the greatest security threat." *Id.* The court found that "the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*." *Id.* at 21a.

The Third Circuit correctly observed that "the *Bell* court explicitly rejected any distinction in security risk based on the reason for detention . . . . Instead, the security risk was defined by the fact of detention in a correctional facility." (Pet'r App. 21a). Further, "*Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates at MCC." *Id.* at 22a. Finally, in a footnote, the court observed that

"[t]he absence of an individualized suspicion requirement in *Bell* is consistent with the Fourth Amendment doctrine of special needs searches," which are permissible, even without reasonable suspicion when "a search furthers a 'special governmental need' beyond that of normal law enforcement . . . ." *Id.* n 8, quoting *Neumeyer v. Beard*, 421 F.3d 210, 214 (3d Cir. 2005).

Because *Florence* correctly interpreted *Bell*, this Court should affirm the decision.

ARGUMENT II

A BRIGHT-LINE RULE ALLOWING BLANKET STRIP SEARCHES OF ALL ARRESTEES ADMITTED TO A JAIL'S GENERAL POPULATION CREATES LESS AMBIGUITY, IS EASIER TO ADMINISTER, AND AVOIDS THE POTENTIAL FOR MANIPULATION INHERENT IN A REASONABLE SUSPICION STANDARD.

A. A bright-line rule allowing a blanket strip search policy is easier for correctional institution personnel to administer and results in less ambiguity in the law when decisions to search are reviewed by courts.

This issue before this Court is whether to affirm the constitutionality of a bright-line rule allowing blanket strip searches of all persons admitted to a jail's general population, or instead require jails to implement a reasonable suspicion standard, which will then be reviewed

on a case-by-case basis on appeal.[2] *Amicus curiae* DRI agrees with the Third Circuit's assessment that a blanket strip search policy

> will help to avoid potential equal protection concerns in the strip search process as it removes officer discretion in selecting which arrestees to search. The potential for abuse in a 'reasonable suspicion' scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest. Subjecting all arrestees to the same policy promotes equal treatment. [*Florence*, 621 F.3d at 310-11.]

Judge Kozinski's concurring opinion in *Bull*, also cited in *Florence*, succinctly articulates the dangers of replacing the bright-line rule of a blanket strip search policy with a reasonable suspicion standard. In Judge Kozinski's view, the issue is "whether federal judges can force government officials to subdivide classes of people subject to a valid

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2. In federal circuits where reasonable suspicion is required for strip searches, the courts employ a case-by-case consideration of the circumstances to determine after the fact whether reasonable suspicion existed for a strip search. See e.g. *United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007) (In evaluating whether the suspicion was reasonable, court looks at the totality of the circumstances of each case to see whether the detaining officer had a particularized and objective basis for suspecting legal wrongdoing.); *Hill v. Bogans*, 735 F. 2d. 391, 394 (10th Cir. 1984) (After reviewing the circumstances surrounding the search, the court reversed the trial court's ruling that the search complied with the Fourth Amendment.)

Fourth Amendment search into sub-classes that present a materially different Fourth Amendment calculus." *Bull*, 595 F.3d at 982-983 (Kozinski, J., concurring).

Several factors counsel against creating these sub-classes of individuals "as to which a different Fourth Amendment balance must be struck." *Bull*, 595 F.3d at 984 (Kozinski, J., concurring). "First, there's a degree of subjectivity that attends any classification," and "in a democracy there is a very important value, enshrined in the Equal Protection Clause, in treating everyone who stands on the same footing alike." *Id.* Second, "lines drawn by courts rather than dictated by the functional requirements of an activity tend to be ambiguous, subject to manipulation and difficult to administer." *Id. Bull* demonstrated this point because "[t]he district court carved out a class of people to exempt from the strip search policy consisting of all those arrested on a charge not involving (a) weapons, (b) controlled substances, or (c) violence, and (d) as to whom there was not individualized reasonable suspicion." *Id.* at 985. As Judge Kozinski observed, however, "[e]ach criterion is porous and subjective; there can be endless quarrels (and lawsuits) as to whether someone did or did not fall into any of the categories." *Id.*

"[T]he most troublesome category," in Judge Kozinski's view, involves "cases where the deputies determine there's individualized suspicion for a search." *Bull*, 595 F.3d at 986 (Kozinksi, J., concurring). As is the concern of *amicus curiae* DRI, "[h]ow, exactly, are deputies to know what does and does not amount to individualized suspicion, and who ultimately decides?" *Id.* It is clear that, "[n]ot only will courts have to draw these difficult lines; jails will have to guess how courts will draw them." *Id.*

In fact, the arguments advanced by petitioner and his amici have the potential to exacerbate this problem. Specifically, they suggest that criminal history—not merely the offense giving rise to arrest—might alone trigger individualized suspicion. See Pet'r Br. 33 ("prior criminal history" seemingly without even requirement of conviction); NACDL Br. 8; Former Jail and Corrections Professional Br. 12-13; Cert. Petition 20 (NJ allows strip searches on "individuals who have a history of violence"). DRI suggests that it would be unworkable at best to implement a policy that requires guards to determine if someone has a "history of violence," or evaluate a person's criminal record to determine if, for example, (i) an assault charge or conviction years before, (ii) a recent drug offense, or (iii) even a marijuana arrest while the arrestee was in college is enough to trigger suspicion in a particular case.

With a reasonable suspicion standard, *amicus curiae* DRI's members cannot definitively advise their local government clients in advance what a court will decide, and the concern is that, "[b]eing the subject of a court order and risking personal liability, deputies will probably err on the side of caution, to the detriment of prisoners faced with an increased risk of harm from smuggled contraband." *Bull*, 595 F.3d at 986 (Kozinksi, J., concurring). Moreover, it is likely that "those involved in operating the institution will be devoting most of their time and energy to averting liability rather than running the institution effectively." *Id.* at 988. A jailer's job is not to distinguish between categories of offenders; doing so would effectively second-guess the legislature's wisdom in making certain offense categories subject to arrest (rather than citation) and second-guess the courts for

denying bail to certain misdemeanants or incarcerating other individuals for civil contempt. Rather, the jailer's duty is to run the facility in the safest manner for all confined there.

An additional worry is that, when a search ends up in court, it will be difficult for officers to prove that they had individualized suspicion. *Bull*, 595 F.3d at 986 (Kozinski, J., concurring). "By its nature, individualized suspicion will rely on observations and diagnoses that will be hard (if not impossible) to record and relay to judges and juries months or years after the event." *Id.* at 987. The inevitable result is that, "the judicial creation of sub-classes exempt from a search regime . . . will likely . . . require far too much judicial involvement in the administration of the sub-class." *Id.* at 987. In short, "every strip search will become a potential federal case." *Id.*

Courts and commentators have recognized the problems posed by such standards in this and other contexts as well. This Court has addressed suspicion-based drug search policies in a public school context, and its conclusions apply equally to the circumstances of this case. First, "[s]uch a regime would place an additional burden on public school teachers," or, prison administrators, "who are already tasked with the difficult job of maintaining order and discipline." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002). Second, "a program of individualized suspicion might unfairly target members of unpopular groups." *Id.* Third, "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.*

Generally speaking, "[a] rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard." *MindGames, Inc. v. W. Pub. Co., Inc.*, 218 F.3d 652, 657 (7th Cir. 2000). Balancing tests and totality-of-the-circumstances tests, used to review the reasonableness of searches under the Fourth Amendment, also constitute standards, which, while allowing for "the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules," Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58-59 (1992), are also "vague and open-ended[,] . . . invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate." *MindGames*, 218 F.3d at 657. On the other hand, a rule like the blanket strip search policy at issue here, "once formulated, afford[s] decisionmakers less discretion than do standards." *Sullivan*, 106 Harv. L. Rev. at 57. "Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere." *Id.* at 58.

In the circumstances of this case, it is the view of *amicus curiae* DRI and those who favor rules that "rules require decisionmakers to act consistently, treating like cases alike." *Sullivan*, 106 Harv. L. Rev. at 62. As a result, "rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decisionmaking calculus." *Id.* at 62. Wayne LaFave's observations on rules and standards as they relate to the Fourth Amendment, although addressing the law in general as it affects police officers in performance

of their duties, are equally applicable to correctional institution personnel required to determine whether there is reasonable suspicion to conduct a strip search on an individual entering the general population of a jail.

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.
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> The essential point . . . is that we must resist the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity lest we end up with a fourth amendment with all of the character and consistency of a Rorschach blot. . . . [I]t may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication. And thus, as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in

> only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former. [Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines' and "Good Faith' (Fna)*, 43 U. Pitt. L. Rev. 307, 320-321 (1982) (internal citations and punctuation omitted).]

Amicus curiae DRI believes that the problems that will flow from after-the-fact case-by-case strip search decisions will be serious. Lawyers attempting to offer guidance will find it difficult to accurately predict the outcome of the after-the-fact analysis of juries and courts. Thus, their ability to counsel and train their clients is apt to be hampered by a lack of clear guidance.

B. This Court has approved the use of bright-line rules allowing searches without reasonable suspicion in several contexts where the individuals to be searched are determined by participation in an activity or membership in a class and where requiring reasonable suspicion is impractical and can result in abuse of discretion and unfairness.

As this Court has explained, "[U]nder our general Fourth Amendment approach' we 'examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson v. California*, 547 U.S. 843, 848 (2006), quoting *United States v. Knights*, 534 U.S. 112, 118 (2001). Reasonableness "is determined by assessing, on the one hand, the degree to which it intrudes upon an

individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* Nevertheless, this Court has approved the use of bright-line rules allowing searches in situations where the government's interest in performing a search outweighs any intrusion on an individual's privacy. In these cases, individualized suspicion is not required; indeed, "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 624 (1989). Rather, the government is "entitled to search classes of individuals based on a balance struck for the class as a whole, regardless of whether there's reasonable suspicion-or any suspicion at all-as to any particular member." *Bull*, 595 F.3d at 983 (Kozinski, J., concurring). These classifications "trade the protection afforded by individualized suspicion for protection derived from the fact that the government treats all similarly situated people in precisely the same way." *Id.* Importantly, these cases also recognize *amicus curiae* DRI's concern that implementing a reasonable suspicion standard is often impractical and the discretion it affords subject to abuse.

1. **Prisoners have, at most, a lesser expectation of privacy that, when coupled with the security needs of a prison, allow for searches without reasonable suspicion.**

As discussed, this Court determined in *Bell* that visual body-cavity searches of all detainees who engaged in contact visits while housed at a federal correctional institution were constitutionally permissible without a showing of reasonable suspicion. *Bell*, 441 U.S. at

560. The Court observed that "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations," a principle which "applies equally to pretrial detainees and convicted prisoners." *Id.* at 545-46. The Court recognized that, in a prison context, "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546. Thus, while assuming that "both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility" the Court concluded that the searches at issue in *Bell,* conducted without individualized suspicion, were reasonable under the Fourth Amendment.[3] *Id.* at 558 (footnote added).

Similarly, in *Samson v. California, supra,* this Court upheld the warrantless, suspicionless searches of prisoners released on parole. The Court explained that "parole is an established variation on imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Samson,* 547 U.S. at 850

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3. In a later case that did not address strip searches, this Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Hudson v. Palmer,* 468 U.S. 517, 525-26 (1984).

(internal citations and punctuation omitted.) In California, pursuant to Cal.Penal Code Ann. § 3067(a), inmates who opt for parole submit to suspicionless searches by a parole officer or other peace officer "at any time." *Id.* at 852. Thus, the petitioner in *Samson* "did not have an expectation of privacy that society would recognize as legitimate." *Id.* By contrast, this Court recognized that the state's interests in such searches "are substantial," in that "a State has an overwhelming interest in supervising parolees because parolees ... are more likely to commit future criminal offenses." *Id.* at 853. This interest thus warrants "privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.*

Importantly, this Court in *Samson* recognized the impracticality of a reasonable suspicion standard in the circumstances at issue there, agreeing with the California legislature's assessment that "given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." *Samson*, 547 U.S. at 854. This Court further observed that "[i]mposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality." *Id.*

2. **The case against individualized suspicion here, is at least as strong as cases in which this Court repeatedly has rejected such a requirement.**

a. **Drug testing transportation employees and certain government employees without individualized suspicion is reasonable under the Fourth Amendment because the government has an interest in ensuring the safety of the public and implementing a reasonable suspicion standard is unworkable.**

In *Skinner v. Ry. Labor Executives Ass'n*, *supra*, this Court upheld as constitutional Federal Railroad Administration (FRA) regulations "that mandate blood and urine tests of employees who are involved in certain train accidents," and that "authorize, railroads to administer breath and urine tests to employees who violate certain safety rules." 489 U.S. at 606, 613. Citing *Bell*, among others, this Court explained that it may make an exception to the warrant and probable cause requirements of the Fourth Amendment when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. *Id.* This Court recognized that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety," was similar to "its supervision of probationers or regulated industries, or its operation of a government office, school, or prison," all of which are situations that present "special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 620 (citations and punctuation omitted). The Court found that the

expectations of privacy of the employees at issue "are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627. Thus, drug testing railroad employees was such a situation where "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion . . . ." *Id.* at 624.

Finally, the Court addressed the impracticality of requiring individualized suspicion of drug or alcohol use at the scene of an accident investigation. Such a policy "would seriously impede an employer's ability to obtain this information, despite its obvious importance." *Skinner*, 489 U.S. at 631. This Court recognized that "[o]btaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident." *Id.* Thus, "[i]t would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances." *Id.* See also *Int'l Brotherhood of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (Random, pre-employment, post-accident, and biennial drug testing does not violate truck drivers' fourth amendment right against unreasonable searches).

In *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), this Court upheld the United States Customs Service's policy of requiring drug testing for employees who sought transfer or promotion to certain positions where they would be engaged directly in drug interdiction or were otherwise required to carry firearms.

Id. at 668, 677. This Court noted that, "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.* at 672. The Court reiterated that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Id.* at 665. In fact, as is relevant in this case, "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id.* at 667-68 (internal citations and punctuation omitted.) *Amicus curiae* DRI agrees that, in certain situations such as this case, "the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Id.* at 668.

Additionally, the privacy interest of prison inmates, at issue here and in *Bell*, is far lower than in *Skinner* or *Von Raab*, which involve individuals who simply decide to work for the government (*Von Raab*) or a government-regulated entity (*Skinner*). The privacy intrusion in such cases was acknowledged to be quite high, see *Skinner*, 489 U.S. at 617 (although the procedures at issue in did not require "a surgical intrusion," "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic,

pregnant, or diabetic"); *id.* (quoting *Von Raab* regarding the intrusion in watching someone urinate).

b. A bright-line rule of searching all members of the public crossing the border, boarding airplanes, and entering a government building is easier to administer than a reasonable suspicion standard and avoids abuse of discretion.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that, consistent with the Fourth Amendment, "a vehicle may be stopped at a fixed [immigration] checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." *Id.* at 545. Additionally, "the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant." *Id.* In such a situation, a reasonable suspicion standard "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.* at 557. Furthermore, "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly." *Id.* at 557.

In explaining its decision, this Court also addressed the proper level of discretion to be afforded to border patrol officers. In an earlier case, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court had rejected roving patrol stops near the Mexican border that were not based on reasonable suspicion because such

searches "would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.* at 882-83. On the other hand, fixed checkpoint stops

> both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review. *[Martinez-Fuerte*, 428 U.S. at 559.]

So, too, do the blanket strip searches in the case at bar avoid abuse of discretion and prevent correctional institution personnel from oppressing particular individuals or groups of people.

In *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), the court of appeals determined that an airport search of carry-on baggage, absent individualized suspicion is reasonable. In *Edwards*, a case decided years before the tragedy of September 11, 2001, the court recognized that "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness . . . ." *Id.* at 500, quoting *U.S. v. Bell*, 464 F.2d 667, 675 (2d. Cir. 1972) (Friendly, J., concurring), cert. denied 409 U.S. 991 (1972). The court also recognized the benefits of a bright-line rule requiring everyone to be searched because "[t]he search of carry-on baggage, applied to everyone, involves not the slightest stigma. . . ." that would result if individuals were searched based on reasonable suspicion. *Id.* (citation omitted.) See also *McMorris v. Alioto*, 567 F.2d 897, 900 (9th Cir. 1978) (A limited search conducted as a condition of entering a state courthouse is reasonable under the Fourth Amendment).

c. Drug searches for students participating in school activities do not require individualized suspicion because a school's interest in preventing drug use outweighs any privacy interest and targeted searches are impractical and subject to abuse.

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court upheld a policy of drug-testing all student athletes who participate in the district's athletic programs. *Id.* at 648. The Court reiterated that a search unsupported by probable cause can be constitutional, "when special needs, beyond the normal need for law

enforcement, make the warrant and probable-cause requirement impracticable." *Id.* at 653, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). In the specific context of a school, the state's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. Thus, while children retain constitutional rights (as do prisoners), "the nature of those rights is what is appropriate for children in school." *Id.* at 655-56.

The Court found that public school children have a somewhat lesser expectation of privacy than members of the general population because they are routinely required to submit to various physical examinations and to be vaccinated against various diseases. *Vernonia Sch. Dist.*, 515 U.S. at 656-57. Moreover, citing the public locker rooms used by those engaged in sports, this Court observed that "[l]egitimate privacy expectations are even less with regard to student athletes." *Id.* at 657.

As is relevant to this case, *Vernonia* addressed the pitfalls of replacing the bright-line rule of testing all student athletes with a suspicion-based policy. Such a change would "transform[] the process into a badge of shame" and "brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students." *Id.* at 663. The Court also recognized *amicus curiae* DRI's concern here that a suspicion-based policy would "generate[] the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed." *Id.* at 663-64. Finally, the Court recognized that a suspicion-based policy would add to "the ever-expanding diversionary duties of schoolteachers the new function

of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 663-64.

Relying on *Vernonia*, the Court in *Pottawatomie County, supra*, upheld as constitutional the school district's policy requiring all middle and high school students who participate in competitive extra curricular activities to submit to drug testing, without a showing of individualized suspicion. The respondents argued that "because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*." 536 U.S. at 831. The Court disagreed, explaining that "[t]his distinction . . . was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority." *Id.* In addition, this Court noted that it "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." *Id.* at 835, citing *Von Raab* and *Skinner*. Finally, the Court noted that "*Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities." *Id.* at 838. This Court thus concluded that the drug testing of students who participate in extracurricular activities "effectively serves the School District's interest in protecting the safety and health of its students." *Id.*

As it did in *Vernonia*, this Court also addressed the dangers inherent in a suspicion-based policy, which, as discussed, apply equally to the circumstances of this case.

First, "[s]uch a regime would place an additional burden on public school teachers," or, prison administrators, "who are already tasked with the difficult job of maintaining order and discipline." *Id.* at 837. Second, "a program of individualized suspicion might unfairly target members of unpopular groups." *Id.* Third, "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.*

In addition to the concerns expressed in *Pottawatomie County*, implementation of more targeted policies involving strip searches in correctional institutions requires additional training that "takes time away from other tasks and necessarily uses resources in scarce supply." *Bull*, 595 F.3d at 976. Moreover, if a reasonable suspicion standard replaces a bright-line rule, "every strip search will become a potential federal case," *Id.* at 987 (Kozinski J., concurring), and it will be difficult for DRI members to counsel their local government clients on ways to effectively avoid this litigation. Because the resulting lawsuits will necessarily be based on a multiplicity of facts, they will be difficult to resolve at the motion stage, a disheartening prospect for the many local governments facing unprecedented financial problems.

As this Court has made clear, reasonable suspicion is not a requirement in a case such as this where individuals are defined as a class, that is, all arrestees admitted to a jail's general population, and where the government's need to maintain safety and order outweighs the incarcerated individual's diminished privacy interests. *Bell* specifically recognized that, in a correctional institution, "maintaining institutional security and preserving internal order and

discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546. The blanket strip search policy at issue in this case is intended to prevent the entry of weapons and contraband into correctional institutions, a serious and well documented problem. *Id.* at 599. Thus, a blanket strip search policy is reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE, PETITIONER

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR SISTER BERNIE GALVIN ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Sister Bernie Galvin, Betty Welch, Laura Goode, Michael Fanning, Mary Doe[2], Debra Maloy, Judith Haney, Vanessa Hunt, Theodore Medina, Brian Vowell, Daniel Schaffer, Andy Mean, and Jeffery Pey are former jail detainees who, while in custody awaiting the setting of and posting of bond, or while awaiting trial, have been subjected to routine strip and visual body cavity searches (hereafter frequently referred simply as "searches" or "strip searches") as a matter of jail policy. The searches were conducted without probable cause or reasonable suspicion that the person searched was in the possession of contraband, or any other substance that would justify or necessitate the strip and/or body cavity search, including where the charges on which they were arrested did not suggest the potential presence of drugs or weapons of any sort. As their experiences attest, such strip searches typically include (a) a visual inspection of the outside of the naked body by custody personnel, (b) a visual inspection of the mouth and ears, (c) a visual inspection of the anal cavity, and (d) for female inmates a visual inspection of the vaginal cavity.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the amicus curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *Amicus* use the pseudonym Mary Doe because counsel have been unable to contact the individual prior to the filing of the instant brief.

The strip searches are typically conducted in groups without privacy, *i.e.*, in the presence of other inmates.

Amicus share their stories, and the stories of other detainees with similar experiences, to provide a human face to this most personally invasive of law enforcement practices. These stories are representative of experiences of thousands of detainees repeated each year. They highlight the fact that such strip searches – routinely visited on those frequently never charged or convicted, or on those charged with minor crimes not resulting in a custodial sentence – are extremely personally intrusive, humiliating, frightening, and embarrassing. They strip one of any semblance of human dignity or privacy.

ARGUMENT

I. Courts Have Recognized For Decades That Strip Searches Are By Their Nature Humiliating and Degrading

Strip and visual body cavity searching entails one of the most humiliating and degrading practices available to law enforcement. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985) ("body cavity searches are 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.'" quoting *Marybeth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir.1983)); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir.1980) (*per curiam*) (strip search of a minor student absent reasonable cause violates "any known principle of human decency" and "exceed[s] the 'bounds

of reason' by two and a half country miles."); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.1982) (strip search is "an embarrassing and humiliating experience," involving an "extensive intrusion on personal privacy"); *Kennedy v. Los Angeles Police Dep't.*, 901 F.2d 702, 711 (9th Cir.1990) (visual body cavity searches are "dehumanizing and humiliating"); *Bell v. Wolfish*, 441 U.S. 520 at 576-77 (1979) (Marshall, J., dissenting) ("body cavity searches ··· represent one of the most grievous offenses against personal dignity and common decency"); *In re Nassau County Strip Search Cases*, 2008 U.S. Dist. LEXIS 29083 *8 (E.D.N.Y 2008) (certifying damages class because of the predominant injury to human dignity suffered by each plaintiff in the same manner because of his or her humanity).

Across the country, in Circuits that have considered the issue, the consensus reached is that jailhouse strip searches are, by their very nature humiliating and degrading. "We have previously recognized, 'as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities.'" *Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985), citing *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir), *cert. den.*, 464 U.S. 999, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983). "[A] strip search can hardly be characterized as a routine procedure or as a minimally intrusive means of maintaining prison security. Indeed, 'a strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual.'" *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996); *see also Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489-90 (9th Cir.1986) ("[T]he fact that a strip search is

conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that a strip search is a significant intrusion on the person searched ..."); *accord Boren v. Deland*, 958 F.2d 987, 988 N.1 (10th Cir. 1992). "The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989).

Strip searches, as will be shown in the following section of *Individual Strip Search Stories*, proceed in a well-defined pattern and procedure that contain the following basic elements which differ only slightly among jurisdictions. The detainee is brought into an area designated for strip searches such as a large room or hallway. The detainee is often herded into the strip search area in a group with other similarly situated detainees. They are ordered to remove all clothing, including their undergarments, and either hand them to the officer for searching, or place them on the ground. Though not always in the same order, the detainees are typically asked to present their mouth and ears for visual inspection, turn around once or twice to show their naked bodies, and show officers the soles of their feet. *Roberts v. State of Rhode Island*, 239 F.3d 107, 109 (1st Cir. 2001). Men are ordered to lift or manipulate their genitals to show that nothing is hidden underneath, and women are ordered to lift their breasts to show that nothing is hidden underneath. Detainees are then ordered to face away from the officer, bend over and spread their butt cheeks open so officers may visually inspect their anal cavity. *Lopez v. Youngblood*,

609 F. Supp. 2d 1125, 1130 (E.D. Cal. 2009).[3] Women, in addition, must spread their vaginal lips open for visual inspection inside. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1267 (7th Cir. 1983). It is only after undergoing the aforementioned experience that detainees are permitted to put their clothes back on.

II. Individual Strip Search Stories

The descriptions below are of individuals who have experienced strip/visual body cavity searches first hand, either as class representatives, class members, individual plaintiffs, or persons who have consulted counsel. In most cases, but not all, the experiences summarized here were presented to courts during litigation. The names of the involved jurisdictions are provided showing that these individuals represent a cross-section of different geographic areas and jails, and that the experiences of those subjected to strip and visual body cavity searches are very similar wherever such searches occur. In most instances, the experiences related here have been presented in court documents, and in some cases described in court opinions.

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[3] "Per [Kern County, California, Sheriff's Office] Search Procedure, a strip search involves a 'visual inspection of the underclothing, female breasts, buttocks, or genitalia of such person.' KCSO, Detentions Bureau Policies and Procedures, Search Procedures C-500, p. 2. A strip search includes a visual body cavity search. A visual body cavity search includes a 'visual inspection of the anus and/or vaginal area; generally requiring the subject to bend over and spread the cheeks of the buttocks, to squat, and/or otherwise expose body cavity orifices.'" *Id.*

A. *Sister Bernie Galvin (San Francisco, California)*[4]

Sister Bernie Galvin, a Catholic nun, has been a Sister of the Divine Providence for over 50 years. She is a resident of the City of San Francisco and was arrested in 2003, at an anti-war demonstration. She was charged with trespassing as well as interfering with a police officer in the performance of his duty. Sister Galvin was transported to San Francisco County Jail No. 9 where she was strip searched according to the County's policy at the time. All her clothes were taken from her in exchange for a scanty paper hospital-like gown and she was escorted to a cold waiting cell. During the next two hours, her pleas for some cover to keep warm, even another paper gown, were in vain. When Sister Galvin was later ordered to accompany the attendant for a strip-search, she refused to submit to that, which she felt was clearly unnecessary and an assault on her dignity. The charge person was called. Her clear message to Sister Galvin left no doubt as to her determination: '"Then you can simply stay in that cell until you do as you are ordered!" Realizing the futility of her protest and growing ever colder, Sister Galvin caved in an hour or so later, and submitted to the strip and visual body cavity search.

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[4] *Mary Bull et al. v. City and County of San Francisco et al.*, Case No. C 03-1840CRB (N.D. Cal.).

B. ***Betty Welch (San Bernardino County, California)***[5]

On or about July 11, 2005, Adelanto police officers arrested Betty Welch on a warrant for failure to appear in court on a DUI charge. The next day, officers transported her to the West Valley Detention Center in San Bernardino County where, upon processing into the jail, she was strip and visual body cavity searched in the presence and view of other women inmates in a hallway, and in the view of County Sheriff's personnel not involved in or necessary to the search.

Two weeks later, Ms. Welch was transported from the jail to the San Bernardino Superior Court for an appearance. Upon her *departure* from the jail, Ms. Welch was strip and visual body cavity searched in a jail hallway in the presence and view of other female inmates, and Sheriff's personnel not involved in or necessary to the search. When she appeared before the court, she was placed on probation and ordered released from custody. She was returned to West Valley Detention Center, where she was again subjected to a strip and visual body cavity search, and then released.

Ms. Welch's strip and visual body cavity searches took place in a hallway off the entrance into the jail. She was always strip searched as part of a group of female inmates, ranging from about seven to 30 or more. The procedure was that, while facing the

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[5] *Karen Craft, et al. v. County of San Bernardino*, Case No. EDCV05-0359 SGL (C.D. Cal.).

deputies, the inmates had to remove all their clothing, including their bras and panties, and shake them out; face the wall, bend over, spread their buttocks, put a finger inside their vaginas, squat, spread the lips of their vaginas, and cough. The deputies forced inmates to squat for painful amounts of time. Ms. Welch and others were forced to stand, naked, so close to one another that they were touching.

During one of the searches, as the inmates were squatting and coughing, the deputies stated that some of the women did not cough correctly. The deputies ordered all the women to remain in the crouched position, holding their buttocks and vaginal lips apart for over a minute, and continuing to cough. Ms. Welch has steel rods and plates in both of her legs and, consequently, suffered considerable pain trying to keep her balance. If female inmates were menstruating, they had to remove their tampons and pads. Some women began to menstruate on the floor. If they did not spread their legs far enough apart, the deputies would kick their ankles to make them spread farther. Although only two female deputies conducted the search, other deputies were present, as were trustees who handed out pads and cleaned up the blood on the floor. There was a large window in the hallway where the searches were conducted. From the other side of the window, male deputies and male inmates being brought into the jail could view the searches of the female inmates through a large window in the search area, as could female inmates in the holding cells.

During the searches, the deputies treated the whole affair as a joke laughing and calling Ms. Welch and others "stinky bitches." Once, an inmate was too

incoherent to lift her breasts as ordered. A deputy ridiculed her saying that, if she couldn't lift her own breasts, then the woman next to her was going to have to lift them. On one occasion, there were pregnant women returning from a hospital run who were strip searched with Ms. Welch. One woman appeared about eight months pregnant. After she had opened and touched her vagina as demanded by the deputy, the deputy mockingly stated "let me see that again." The deputy made the pregnant women squat and cough, which she had a very difficult time doing.

C. *Laura Goode (Rock Hill, South Carolina)*

Laura Goode is a 30 year old woman who has never been arrested before and was employed in the mortgage department of Citigroup. She has severe scarring on her chest from abuse inflicted when she was six years old. She is very self conscious about her skin disfigurement.

In October of 2009 she was returning her cousin to her mother's house about 10:30 at night. She dropped him off and pulled away. She was followed by a marked police car. She was pulled over for failing to have a properly lit tag light. SC Code 56-5-4530 requires that rear tag be visible from 50 feet. She was approached by the uniform traffic officer and informed him that she did not have her license with her. Although her license was valid, SC law requires that she keep it accessible when driving. Narcotics agents showed up and asked to search her car. She declined and thought it was ridiculous to be asked to search a car over a license plate light. She was then told to get out

of the car as she was being arrested. She called her mom on the cell phone, who brought the license to the scene to no avail. She was taken to the back of her car and noticed both tag lights were working. She challenged the officer on the basis of the stop.

At this point the narcotics agents took her to the City of Rock Hill police department. The police drove her car there and searched it while she was in custody. They refused to allow her mother to take the car from the arrest scene although her house was only a few blocks away.

Ms. Goode was taken to the detention part of the facility. She was given a property bag but was not booked in or admitted to the jail. She was taken to a separate room and was forced to undergo a full disrobing by two female officers. She was asked to bend over and a guard separated her butt cheeks and made her cough. When nothing was found, she was placed in a holding cell by herself. After a time an officer came by, took her out of the holding area, returned her property and gave her a ticket for failure to have a license. The charges were dismissed by the police.

D. *Michael Fanning (Nassau County, New York)*[6]

Michael Fanning is an obese, permanently disabled male (310 pounds on a 5'7" frame). He was arrested on July 29, 1997 for a non-felony offense. He

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[6] *In re Nassau County Strip Search Cases*, Case No. 99-CV-2844 (DRH) (E.D.N.Y.).

was transported to jail, and brought into the strip search room with another arrestee. With two corrections officers present, Mr. Fanning and the other arrestee were directed into adjoining stalls. The other man was ordered to step out in front of his own stall and strip searched where Mr. Fanning could see the man's naked rear side from head to toe. While one officer gave instructions, the other officer stood behind the other man during the strip search. During the other man's search, Mr. Fanning was ordered to remove his clothing. After the search, Mr. Fanning was ordered to exit his stall, and instructed to raise his arms. While his arms were raised, an officer told him to open his mouth, and the officer looked in his mouth. Mr. Fanning was told to turn his head, and the officer looked in his ears. The officer then told Mr. Fanning to raise his testicles, which he did. He was told to turn around and to lift up one foot at a time to expose the bottom of his feet. Mr. Fanning was told to spread his feet a bit, bend his knees and try to touch his toes to bend over. Mr. Fanning was then told to stand up and turn around. Throughout the process the officer's tone was abrupt and unfriendly. Mr. Fanning was then walked to another room, while still naked, and told to wait for a uniform. Eventually, Mr. Fanning received a uniform and was able to dress.

E. *Mary Doe (Dauphin County, Pennsylvania)*[7]

Mary Doe, then a 30-year old honor student (and now biophysicist) attending graduate school at Johns

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[7] Mary Doe is a pseudonym. She is a plaintiff in *Reynolds v. County of Dauphin*, Case No. 07-CV-1688 (M.D. Pa.).

Hopkins University, was arrested in Dauphin County, Pennsylvania, for attending an outdoor party that did not have a permit. Ms. Doe had never been arrested before. When she appeared in court, she could not post the $1,051 bail, and was taken to the Dauphin County Jail, where she was forced to strip naked in a circle of other female detainees for a strip search. (It is common in jails throughout the country to strip search inmates returning from court to jail in inmate groups, where the inmates can all view each other while being strip searched.) Ms. Doe informed officers that she was menstruating, and was wearing a tampon. She asked for privacy to take the tampon out. The officers refused her request. The officers then forced Ms. Doe to undergo a strip search, including a visual body cavity search where she was ordered to squat and cough while her vagina and anus were visually inspected. Her tampon forcibly came out while she was bending and coughing, she bled on her leg and on the floor for all to see. The tampon lay on the floor, covered in blood. During the ordeal, other detainees and officers screamed and yelled at her, calling her names like "dirty little pig". Ms. Doe felt humiliated, crushed and devastated. She cried inconsolably during the process, and has had to seek psychiatric help since then to deal with the trauma. The charges against Ms. Doe were dismissed.

F. *Jack Kelly (New Orleans, Louisiana)*[8]

A New Orleans police officer stopped Kelly, a tourist in town for a convention, for making an illegal left turn. Kelly explained that she inadvertently had left her driver's license at her hotel, and the officer called for backup to administer a DWI test, which Kelly passed. The police brought Kelly to a holding facility after arresting her for making the illegal turn and driving without a license.

Kelly called her sister in Baton Rouge and husband in Connecticut and asked them to post bond, but they failed to do so promptly. After Kelly had been at the holding facility between four and five hours, police shackled and handcuffed her and took her to a female detention facility, where they subjected her to a strip and visual body cavity search. The police ordered Kelly to strip, turn around, bend over, spread her buttocks, and cough.

After Kelly dressed, police escorted her to another room, where they told her to strip again and sprayed disinfectant on her crotch, breasts, and head. They then took Kelly to a shower area, where she showered in view of other inmates, before locking her in a cell. Kelly's family bonded her out approximately eleven hours after the arrest.

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[8] This entire narrative comes from the opinion in *Kelly v. Foti*, 77 F.3d 819, 820 (5th Cir. 1996).

G. *Debra Maloy (Allegheny County, Pennsylvania)*[9]

Debra Maloy was arrested on non-felony counts of making false reports to a law enforcement officer, driving with a suspended license and careless driving. After being subjected to an initial search, Ms. Maloy was taken to a holding cell where she remained for approximately seventeen hours. She was strip searched the following day. During the course of the strip search, Ms. Maloy was required to completely disrobe, remove a cranial prosthesis she wears as a result of a medical condition, move her breasts, squat, and manipulate her genital areas, so that she could be visually inspected by the guard. The search was conducted by a female guard but male detainees, as well as another female detainee who was being strip searched next to Ms. Maloy, could all view her body during the search. She was released on her own recognizance six days after her arrest.

H. *Judith Haney (Miami-Dade County, Florida)*[10]

On or about November 21, 2003, Judith Haney was sitting on the sidewalk across from the Miami-Dade

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[9] *Delandro v. County of Allegheny*, Case No. 06-CV-0927 (W.D.Pa.).

[10] *Judith Haney et al. v. Miami-Dade County et al.*, Case No. 04-20516-CIV-Jordan/Brown (S.D. Fla.); *see also* http://www.prisoncommission.org /statements/haney_judith.pdf. where Ms. Haney spoke before the Commission on Safety and Abuse in America's Prisons.

County Pre-Trial Detention Center, along with three other women and three men, when they were arrested for "failing to disburse" [*sic*] and taken across the street to the Detention Center to be booked.

Haney and the other women arrested were separated from the males and, one at a time, taken to a separate area where each woman was made to fully disrobe, place each of her items of clothing on a table, bend over, expose her anus and vaginal area for inspection by officers and then to squat and to "hop like a bunny" three times before being permitted to put her own clothes back on. When Haney was naked, the officer noticed a naval piercing and ordered Haney to remove it. When Haney was unable to remove the navel ring, the officer obtained a wire cutter and clipped it off. During the entire time Haney was standing naked in an area with the door open and with people passing by who could freely observe her. Over the next several hours, Haney and others were transported in paddy wagons to various locations finally arriving at the Turner-Gilford-Knight Miami Detention Center where she was again processed and held in various holding tanks until she was released after approximately 35 hours. All charges against Haney and others arrested with her were later dismissed. At the time, Haney was a 50 year old management employee of Genetech Corporation. She felt extremely humiliated and embarrassed by these experiences.

I. *Vanessa Hunt (Contra Costa County, California)*[11]

In May 2003, Vanessa Hunt was taken into custody following an arrest for an unknown violation of law (reportedly misdemeanor vandalism) after she was removed from her mother's house by officers from the Kensington Police Department. She was taken from the police station to the Contra Costa County jail in Martinez, California. Ms. Hunt was never charged, never had to appear in court, and never arraigned.

Ms. Hunt was processed into the Contra Costa jail and allowed to call a bail bondsman, but she had no money to post bail. After sitting in a chair, handcuffed, from about 1:00 a.m. to about 6:00 a.m. with several other women, they were taken into a room one-by-one by a female officer. In that room the officer ordered Ms. Hunt to remove her clothes and hand them over. The officer searched the clothes and ordered Ms. Hunt to open her mouth, run her fingers through her hair, lift her breasts, lift her arms, turn around, bend over and spread her cheeks, and squat and cough.

Ms. Hunt and six other women were then transported by bus to the West County Jail in Richmond, California. There was never a time that she was alone; there was always an officer nearby. Handcuffed and shackled to the other five detainees, Ms. Hunt was taken into a waiting room where she and the others waited until the transporting officers found officers to whom they could transfer the detainees. The women were then separated and each put into separate

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[11] *Rosalety Barnett, Vanessa Hunt v. Contra Costa County et al.*, Case No. C 04-04437 TEH (N.D. Cal.).

rooms at which time the handcuffs were removed. Ms. Hunt was then ordered to strip down by a female officer and given a bag for her clothes. She was required to undergo the same type of strip search she had just gone through at the Martinez facility – lift breasts, turn around, bend over, spread cheeks, squat and cough. She then waited, naked, in a room until the officer returned with jail clothes and slip-on shoes.

Ms. Hunt was held in jail for a week, after which time she was released with no charges pending and no court appearance.

J. *Theodore Medina (Kern County, California)*[12]

Thedore Medina was arrested by the Kern County Sheriff's Department ("KCSD") in June 2006 on a charge of public intoxication, placed in custody after arrest, and transported to jail. Upon arrival at the jail, KCSD personnel subjected Mr. Medina to a strip and visual body cavity search. During the search, he was ordered to remove all of his clothing, and to bend and squat exposing his anus. In spite of the fact that he is disabled by spina bifida, he was forced to painfully bend over while being insulted and humiliated by jokes being made by Sheriff's personnel. Mr. Medina was strip searched in a room with approximately four or five other arrestees. They were required to be barefoot on the dirty cement floor. They had to stand side-by-side, naked, and tried not to touch or bump against one

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[12] *Marsial Lopez, Sandra Chavez, Theodore Medina, et al. v. Sheriff Donny Youngblood*, Case No. CV-F-07-0474 DLB (E.D. Cal.)

another. Inadvertent contact was inevitable in the limited space, however, including another arrestee bumping his elbow against Mr. Medina's back.

K. *Brian Vowell (San Francisco, California)*[13]

Brian Vowell was arrested in San Francisco in October, 2002 after a traffic stop for an invalid, outstanding misdemeanor traffic warrant that the county had failed to properly recall. Upon arrival at county jail, and before being afforded an opportunity to use the phone or to post bail, he was told he would have to submit to a strip search. He was presented with a "waiver of rights" consent form which he refused to sign on the basis that it was a violation of his rights to strip search him. He was then held in the jail's processing facility for several hours and told he could not use the phone or contact a bail bondsman. He was told that if he did not sign the form consenting to the strip search it would be done forcibly and that he would probably be criminally charged with resisting arrest. Mr. Vowell refused again. Later, he submitted to the strip search, still refusing to sign the consent. Five minutes later, he was led into the room where the phones were, called a friend, and posted $10,000 in cash bail. He was then released on bail. Mr. Vowell was not classified for housing in the general population. The traffic warrant was dismissed.

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[13] *Mary Bull, et al. v. City and County of San Francisco, et al.*, Case No. C 03-1840 CRB (N.D. Cal.).

L. *Daniel Schaffer (Alameda County, California)*[14]

Daniel Schaffer was arrested on August 13, 2005, on a warrant for two traffic violations, driving on a suspended license and driving in a high occupancy vehicle lane. He was transported to Alameda County's Santa Rita Detention Facility where he was booked and held in the intake, transfer and receiving section of the jail, pending bail. He was then transferred to minimum security housing on August 15, 2005, hours before bail was posted. Before going into housing, Mr. Schaffer, along with several other detainees, was taken to a multi-purpose room where he was strip searched in a group. In accordance with policy and practice, a Deputy ordered all of the detainees (at least four (4) of them) simultaneously remove each item of jail clothing and place them on the floor in front of them until they stood nude before the Deputy who then had them bend over and spread their buttocks to permit the Deputy to view their anal areas, turn, facing the deputy, and lift their penis and scrotum for further inspection.

M. *Karen Masters (Jefferson County, Kentucky)*[15]

On July 31, 1986, Karen Masters, a resident of Jefferson County, received two traffic tickets – one for operating an automobile with expired registration plates, and the other for failure to maintain auto

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[14] *Daniel Schaffer v. Alameda County et al.*, Case No. 06-0310 MMC (N.D. Cal.).

[15] This narrative is taken directly from the opinion in *Masters v. Crouch*, 872 F.2d 1248, 1249-50 (6th Cir. 1989).

insurance. As directed by the citation, Mrs. Masters appeared before the Jefferson District Court at a neighborhood government center on August 21 at 7:00 p.m., and pled not guilty. After a second appearance the court directed her to appear before Division 102 of the District Court at the downtown justice center on October 23 at 9:00 a.m. A deputy sheriff in attendance gave her a "reminder card" containing this information, but her name did not appear on the card. By mistake, the judge who presided at the second appearance recorded the plaintiff's next appearance date as October 16 rather than October 23.

On October 21, at about 3:00 p.m. Mrs. Masters was arrested at her home for failure to appear in court on October 16. She protested that her appearance date was October 23, not October 16, and showed the officer the reminder card. The officer confirmed the existence of the arrest warrant and refused her request to call an attorney. Officer Barrows took Mrs. Masters and her two young children in a squad car to the home of Mrs. Masters' mother, where the children were left.

At the corrections building, Mrs. Masters was required to remove her shoes and empty her pockets and "frisked" by a female attendant. While Mrs. Masters was in a "holding room" a different female attendant ordered her to open her blouse. This search occurred in front of a window in the holding room, in plain view of other persons. Approximately four hours after her arrest, she was handcuffed to another woman and taken to a room on the third floor of the Jefferson County jail. At that point, still another female attendant subjected the plaintiff to a strip search over her continued protestations of mistake. The plaintiff was required "to

remove all of her clothing except her underpants and to turn around, drop her underpants, bend over and expose her rectum." After putting on a jail dress, Mrs. Masters was lodged in a jail cell with other persons. Later in the evening she was released on her own recognizance and ordered to report to court at 9:00 a.m. the next day. The following morning the presiding judge acknowledged the recording error that led to the issuance of the arrest warrant.

N. *Mary Ann Tikalsky (Chicago, Illinois)*[16]

On the morning of February 15, 1978, Mary Ann Tikalsky rushed, coatless, out of the Greater Grand Boulevard Mental Health Center, where she was employed as a city social worker, and began berating two Chicago policemen who were ticketing her car. Miss Tikalsky's wrath had been stirred by two circumstances: on the snowbound streets around her office parking of any kind – legal or illegal – was hard to find; and she thought the police department was exhibiting more zeal writing parking tickets than it had shown the week before investigating a robbery in which she had been the victim. Miss Tikalsky's outburst cost her dearly.

She was arrested for disorderly conduct and taken to the Second District Police Station at 51st Street and Wentworth Avenue. There a female detention aide subjected her to a visual strip search. First Miss Tikalsky had to bare her body from the

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[16] *See* narrative from opinion in *Tikalsky v. City of Chicago*, 687 F.2d 175, 177 (7th Cir. 1982).

waist up; then she had to lower her slacks and underwear, squat and bend from the waist several times, and alternately face toward and away from the matron. After the search, Miss Tikalsky was kept in the women's detention center. Although she had money with her, she did not know that she could post bond. She remained in the detention area for four hours, until a friend arrived and paid the $35 bond. On March 3, 1978, Miss Tikalsky was tried and acquitted on the disorderly conduct charge.

O. *Andy Mean and Jeffery Pey (Alameda County, California)*[17]

Andy Mean and Jeffery Pey were arrested as juveniles and were subjected to strip and visual body cavity searches at Alameda County's Juvenile Hall, prior to appearing at a detention hearing and without the county first having a reasonable suspicion that the search would be productive of contraband or weapons. They were also subjected to group strip searches where they could see other juveniles being strip searched and, in turn, could be seen by them as they was strip searched return from family or other visits and following return to the unit on other occasions before and after detention hearings.

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[17] *Lisa Suon, et al. v. Alameda County, et al.*, Case No. 3:07-cv-01770-EMC (N.D. Cal.).

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-945

AUG 2 8 2011

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* MAINE COUNTY COMMISSIONERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Maine County Commissioners Association (MCCA) is a nonprofit organization authorized by Maine law. 30-A M.R.S. § 909. The MCCA brings together, and obtains input from, other member organizations of county government in Maine in order to present a strong and unified voice for Maine's counties and to pursue the objectives that are important to Maine's counties and their constituents. MCCA's members include each of Maine's sixteen counties. Each county operates a jail either on its own or in connection with a neighboring county. Currently, the costs associated with operating Maine's county jails totals nearly eighty million dollars per year or approximately 45% of the total budget for all of Maine's sixteen counties.

The MCCA's appearance as amicus curiae is prompted by the experience of several of its members in defending against strip search cases including: *Wood v. Hancock County Sheriff's Dep't*, 354 F.3d 57 (1st Cir. Me. 2003); *Miller v. Kennebec County*, 219 F.3d 8 (1st Cir. Me. 2000); *Oxley v. Penobscot County*, 714 F. Supp. 2d 180 (D. Me. 2010); *Brazier v. Oxford County*, 575 F. Supp. 2d 265 (D. Me. 2008); *Collins v. Knox County*, 569 F. Supp. 2d 269 (D. Me. 2008); *Tardiff v. Knox County*,

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[1] Pursuant to Rule 37.3(a) of the Rules of the Court, the parties have lodged letters consenting generally to the filing of briefs of amici curiae. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

567 F. Supp. 2d 201 (D. Me. 2008); *Dare v. Knox County*, 2007 U.S. Dist. LEXIS 97463 (D. Me. Apr. 24, 2007); *Nilsen v. York County*, 400 F. Supp. 2d 266 (D. Me. 2005). Defending and resolving these cases has resulted in the expenditure of significant resources. While changes have been made to jail policies to attempt to comply with legal requirements, Maine jails continue to face challenges based on the "reasonable suspicion" standard used in the First Circuit. In addition, jails in Maine continue to have a serious problem with contraband, including drugs, as well as weapons or objects that can be made into weapons. Strip searches are the most effective means of intercepting and deterring the introduction of contraband into correctional facilities. The MCCA urges the Court to adopt a blanket rule permitting strip searches and visual body cavity searches of all arrestees brought to the jail.

SUMMARY OF THE ARGUMENT

This brief argues that a jail policy that permits a blanket strip search of all arrestees upon intake is constitutional. Under the expectation of privacy test in *Hudson v. Palmer* an arrestee's Fourth Amendment right of bodily privacy does not survive incarceration because it always yields to the governmental interest in institutional security. Furthermore, this policy passes the rational basis standard of review as adopted in *Turner v. Safely*. Finally, this issue should be addressed

in a categorical manner instead of on a case by case basis to provide clear guidance to corrections officials throughout the country.

ARGUMENT

I. THE EXPECTATION OF PRIVACY TEST AS OUTLINED IN *HUDSON V. PALMER* APPLIES TO ALL FOURTH AMENDMENT CLAIMS RAISED IN THE CONTEXT OF JAILS OR PRISONS, INCLUDING THOSE OF ARRESTEES.

When Fourth Amendment claims are raised in the context of jails or prisons, courts must first apply an expectation of privacy analysis outlined in *Hudson v. Palmer*, 468 U.S. 517 (1984). This analysis was mandated by *Katz v. United States*, 389 U.S. 347 (1967). *Katz* constituted a dramatic innovation in Fourth Amendment privacy law. In *Katz*, this Court made it clear that, "the Fourth Amendment protects people, not places." *Id.* at 351. *Katz* acknowledged the significance of its ruling and its impact on prior Fourth Amendment analysis stating that, "[i]t is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas' but we have never suggested that this concept can serve as a talismanic

solution to every Fourth Amendment problem." *Id.* at 351 n.9 (citations omitted). By clarifying the Fourth Amendment's protection of "people," *Katz* noted that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. In a concurring opinion, Justice Harlan framed a two step analysis to determine the validity of a Fourth Amendment privacy claim: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

In considering the Fourth Amendment cell-search privacy claim on the merits, *Hudson* applied the "expectation of privacy test" as formulated by Justice Harlan. 468 U.S. at 525 n.7. In doing so, however, it reformulated the test to make it specific to a prison environment. Thus, *Hudson* described the reformulated, prison-based test as requiring courts to "balance" the "interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell." *Id.* at 527. The myriad of risks faced by and obligations imposed upon corrections officials cited by *Hudson* made it clear that this deceptively simple analysis implied a rigorous and comprehensive evaluation of those interests. To emphasize the gravity of that evaluation, *Hudson* quoted Justice Harlan as observing that, "[t]he analysis must, in my view, transcend the search for subjective expectation

. . . [We] should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *Id.* at 525 n.7 (*quoting United States v. White*, 401 U.S. 745, 768, 786 (1971) (Harlan, J. dissenting)).

Hudson's detailed review began with the nature of the prison population. *Hudson* characterized that population as comprising persons with a "demonstrated proclivity for anti-social criminal, and often violent conduct" complemented by an inability to "conform their behavior to the legitimate standard of society by the normal impulses of self-restraint" and "to regulate their conduct in a way that reflects either a respect for the law or an appreciation of the rights of others." *Id.* at 526.

This Court in *Hudson* cited statistics that "illustrate[d] the magnitude of the problem" posed by this confined population including murders of inmates and corrections personnel, riots, suicides, and assaults. *Id.* at 526. These problems were compounded by the introduction of drugs ("one of the most perplexing problems of prisons today"), the need for corrections officials to be "vigilant to detect escape plots," and the ongoing need to "maintain as sanitary an environment for the inmates as feasible, given the difficulties of the circumstances." *Id.* at 527. *Hudson* concluded that managing such risks in such an environment was "at best an extraordinarily difficult undertaking." *Id.* at 527 (*quoting Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)).

Hudson then applied the prison-based "expectation of privacy" test. Turning first to prisoner's expectation of privacy in his cell, *Hudson* cited *Lanza v. New York*, 370 U.S. 139, 143-144 (1962) for the principle that the prisoner's privacy interests were "already limited by the exigencies of the circumstances." *Hudson*, 468 U.S. at 527. [2] *Hudson*'s invocation of *Lanza* is significant because *Lanza* was decided before *Katz v. United States* pronounced the "expectation of privacy" analysis. While noting that the "areas" analysis had never been "talismanic," *Katz* nonetheless recognized its longstanding role in determining Fourth Amendment search and seizure issues. Left unanswered by *Katz* was whether and to what extent the "areas" analysis remained a valid reference point in deciding "expectation of privacy" questions. *Hudson* answered that question for prisons, jails, and detention facilities. In sum, by repeatedly citing *Lanza*, *Hudson* made it clear that in such settings the "areas" analysis was entitled to great

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[2] At that point in the *Lanza* decision, the plurality observed that, "to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects is at best a novel argument." 70 U.S. at 143. Confirming Fourth Amendment privacy interests in a hotel room, an automobile, and a taxicab, *Lanza* continued, "[y]et, without attempting either to define or predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room. In prison, surveillance has traditionally been the order of the day." *Id.*

eight and might, by itself, be determinative of such claims.

In concluding its *Katz* analysis, *Hudson* emphasized that the interest of "institutional security" is "central to all other corrections goals." *Id.* at 527 (quoting in part, *Pell v. Procunier*, 417 U.S. 817, 823 (1974)). Rejecting the prisoner's claim, *Hudson* concluded that, "[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Hudson*, 468 U.S. at 527-528. So great were those institutional interests that this Court in *Hudson* concluded by observing, "we are satisfied that society would insist that the prisoner's expectations of privacy always yield to what must be considered the paramount interest in institutional security." *Id.* at 528.

This is consistent with *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) which was decided five years before *Hudson*. *Bell* is the only jail strip search case decided by this court. *Bell* employed an "*arguendo*" analysis by which this court merely assumed that the claimed Fourth Amendment rights survived incarceration, but the court was openly skeptical that such rights had survived incarceration. *Id.* at 557-559. With respect to the cell-search claim, the court observed: "[i]t may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and therefore the Fourth Amendment

provides no protection for such a person." *Id.* at 556-557. In posing the privacy right for strip searches, *Bell* cited *Lanza*, which it cited earlier in positing the cell search privacy right, reinforced, literally in mid-sentence, by a citation to *Stroud v. United States*, 251 U.S. 15, 21 (1919). *Bell*, 441 U.S. 520, 558. Both *Lanza* and *Stroud*[3] rejected Fourth Amendment claims raised in prison settings. This court in *Bell* stated that a detention facility or prison practice "must be evaluated in the light of the central object of prison administration, safeguarding institutional security." 441 U.S. at 547 (citations omitted).

Hudson, therefore, both confirmed and made explicit the pattern that is to be followed for the evaluation of Fourth Amendment privacy rights raised by those in confinement. Under *Hudson*, that analysis

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[3] *Stroud* concerned a claim raised by a prisoner whose mail was read pursuant to prison policy. 251 U.S. at 21. As a direct result, when the prisoner underwent a re-trial of his murder conviction, "certain letters" were introduced into evidence against him. *Id.* Stroud was re-convicted and the life imprisonment sentence he had received after his first trial was changed to a sentence of death. This Court rejected Stroud's Fourth Amendment claim that his letter should have been "returned" observing, *inter alia*, that "[the letters] came into possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances, there was. . . [no] unreasonable search or seizure in violation of his constitutional rights." *Id.* at 21-22.

must involve a review of interests under the *Katz* criteria. *Hudson* mandated further that, consistent with *Bell*, in applying *Katz* courts must incorporate an "areas" element that recognizes the broad range of interests that are implicated in jail, detention facilities or prison settings.

II. JAIL POLICIES AND PRACTICES, INCLUDING STRIP SEARCH POLICIES AND PRACTICES, SHOULD BE GOVERNED BY THE STANDARD DEVELOPED IN *TURNER V. SAFLEY*.

At the time this Court decided *Bell v. Wolfish*, it had decided several cases which had challenged prison policies and practices which restricted or eliminated rights guaranteed to citizens by the Constitution. These cases raised novel issues about whether and to what extent particular constitutional guarantees survived incarceration and what standard of review should be applied to those practices and policies.

In these cases, this Court developed a standard and a series of factors, including the allocation of burdens, which should be employed to determine the validity of a jail or prison regulation. The Court articulated these factors in full in *Turner v. Safley*, 482 U.S. 78 (1987) and, almost immediately thereafter, applied them again in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

In *Turner*, the Court reviewed the rationales that had undergirded earlier decisions in which Constitutional challenges had been raised to prison or detention facility policies. First, *Turner* noted, federal courts "must take cognizance of the valid constitutional claims of prison inmates." 482 U.S. at 84 (*citing Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). Next, the Court noted both Constitutional and practical limitations on the ability of courts to intervene in the operation of prisons. From a practical perspective, it described courts as being "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* (*citing Martinez*, 416 U.S. at 405). Such problems were "not readily susceptible of resolution by decree." *Id.* (*citing Martinez*, 416 U.S. at 404-405).

From a Constitutional perspective, this Court stated that "[p]rison administration is . . . a task that has been committed to the responsibility of the [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 85. *Turner* noted further that principles of federalism also counseled caution stating that, "[w]here a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord judicial deference to the appropriate prison authorities." *Id.* (*citing Martinez*, 416 U.S. at 405).

The *Turner* Court stated that *Martinez* had presented the Court with the challenge of "formulat[ing]

a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoners' complaints and [to] the need to protect constitutional rights.'" *Id.* (quoting in part from *Martinez*, 416 U.S. at 406). Although *Martinez* had articulated a standard for review of prison regulations, *Turner* observed that it had limited its holding to the "'consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners.' . . . We expressly reserved the question of the proper standard of review to apply in cases 'involving questions of prisoners' rights.'" *Turner*, 482 U.S. at 85-86 (*quoting Martinez*, 416 U.S. at 409).

Turner then reviewed four landmark decisions rendered after *Martinez* on claims raised by prisoners and pretrial detainees; the four cases considered constitutional claims raised in disparate settings. Two of the cases involved prisons, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) and *Pell v. Procunier*, 417 U.S. 817 (1974). The other two involved a county jail and a federal detention facility. *Block v. Rutherford*, 468 U.S. 576 (1984) (county jail); *Bell v. Wolfish*, 441 U.S. 520 (1979) (federal detention facility).

The four cases also considered a wide spectrum of constitutional claims. *Block v. Rutherford* concerned a Due Process challenge to jail policies governing contact visits and cell searches; *Bell v. Wolfish* concerned First Amendment Free Speech and Fourth Amendment

privacy claims. It also concerned a challenge to "double bunking" that was, at least in part, premised on privacy claims.[4] *Bell* also considered the novel question of when restrictions on pretrial detainees would constitute "punishment," a measure limited by the Constitution to convicted prisoners. *Bell*, 441 U.S. at 538-539.

Jones v. North Carolina Prisoners' Labor Union, Inc. concerned First Amendment Free Speech claims, First Amendment rights of association, and Equal Protection claims. *Jones*, 433 U.S. at 637. *Pell v. Procunier* concerned First and Fourteenth Amendment claims, including Free Speech claims raised by prisoners, and Freedom of the Press claims raised by persons who were not prisoners. *Pell*, 417 U.S. at 820-821.

Having earlier stated that *Procunier v. Martinez* "expressly reserved the question of the proper standard of review to apply to cases 'involving questions of 'prisoners' rights,'" the Court made its objective clear: "[i]f *Pell*, *Jones*, and *Bell*, have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation imposes on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 85, 86, 89. In so framing the "question posed," the Court

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[4] It is not clear whether the double-bunking privacy claims were claimed to reside in the Fourth Amendment. *See Bell*, 441 U.S. at 542 (citing *Wolfish v. Levi*, 573 F.2d 118, 127 (2d Cir. 1978)).

strongly suggested that its prior decisions had already fully articulated the proper standard of review. Nonetheless, after articulating the "proper standard of review," *Turner* identified both the rationale for the standard and the benchmarks to be observed in applying it.

The rationale for limited review of the practices and policies of prisons, jails, and, detention facilities, *Turner* observed, lay fundamentally in the requirement that, "prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations." *Id.* at 89 (*quoting Jones*, 433 U.S. at 128).

In identifying the benchmarks for applying the "reasonably related" standard, *Turner* did not purport to plow new ground but, rather, cited prior decisions for each factor. The first standard cited by *Turner* was that "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. *Turner* prefaced its articulation of this standard by citing *Pell*, *Jones*, and *Bell* as prior authority. *Id.* The phrase, "valid, rational connection," was taken from *Block*. *Id.* (*citing Block*, 468 U.S. at 586). Thus, in setting forth the fundamental standard by which prison policies and practices were to be judged, *Turner* expressly relied on decisions involving prisons (*Pell* and *Jones*), federal detention facilities (*Bell*), and jails (*Block*). To add further direction to this analysis, *Turner* explained that, "a regulation cannot be sustained

where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The "legitimate governmental interest," itself, moreover, must be "legitimate and neutral." *Id.* at 90.

It is also noteworthy that *Pell*, *Jones*, *Bell*, and *Block* also involved a broad array of constitutional claims and an equally broad spectrum of prisoners ranging from sentenced prisoners to federal detainees to state detainees. It is apparent that, for the *Turner* Court, these were distinctions without a difference in formulating this fundamental standard of review.

In addition, *Turner* identified the object of the "valid, rational connection" using two different terms, each taken from earlier decisions. At one point, it referred to "legitimate penological interests" and, later, it referred to a "legitimate governmental interest." *Turner*, 482 U.S. at 89.

Finally, *Turner* implied that the burden of establishing a "valid, rational connection," in the first instance, rested on officials administering the correctional facility. Here, *Turner* referred to the "legitimate governmental interest put forward to justify [the challenged policy or practice]." *Id.* Implicit in this element were the twin assumptions that the prison administrators were in the best position to explain the rationale behind a particular policy and that prisoners and detainees should not be required to guess at those rationales to prove their claims.

Having articulated the standard of review, the *Turner* Court explained how it should be employed. Once the justification for the policy had been advanced by prison officials, courts could test the "reasonableness" of the policy by assessing, "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90 (citing *Jones*, 433 U.S. at 131).[5] Where "other avenues" exist, *Turner* cautioned, "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Turner*, 482 U.S. at 90 (quoting in part, *Pell*, 417 U.S. at 827).

In articulating this test, *Turner* did not suggest that the absence of "other avenues" would necessarily invalidate the policy. To the contrary, in *O'Lone v. Estate of Shabazz* issued only nine days after *Turner*, the Supreme Court held that a prison schedule that made the observance of a particular religious practice a practical impossibility, nonetheless was valid under the *Turner* analysis. 482 U.S. at 353.

Yet another factor mandated by *Turner* was an assessment of "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. The *Turner* Court

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[5] The concept of "reasonableness" set forth in *Turner* should not be confused with the concept of "reasonableness" grounded in the Fourth Amendment. *See, e.g., Bell*, 441 U.S. at 559.

cautioned that, "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Id.* In assessing this "'ripple effect' on fellow inmates or on prison staff," *Turner* cautioned, "courts should be particularly deferential to the informed discretion of corrections officials." *Id.* (citing for comparison, *Jones*, 433 U.S. at 132-133).

The final factor identified by *Turner* is essentially an evidentiary consideration. As *Turner* explained, the claimant could seek to demonstrate that a prison policy was not reasonable by showing the presence of "ready alternatives" to the policy that would, "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 91. Put another way, *Turner* said that, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 90.

Turner made it clear that the burden of showing the availability of such "ready alternatives" lay squarely on the claimant. The Court explained that, "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* By coupling the concept of "obvious, easy alternatives" to evidence of an "exaggerated response" by prison officials to perceived risks, *Turner* invoked, without specific citation, a concept

and burden of proof that had been articulated in *Pell*, reaffirmed in *Jones* and cited repeatedly in *Bell*; that is, that because the management of prisons was "peculiarly within the professional expertise of corrections officials . . . in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [prison] considerations, courts should ordinarily defer to their expert judgment in such matters." *Jones*, 433 U.S. at 128 (*citing Pell*, 417 U.S. at 827); see also, *Bell*, 441 U.S. at 540, 547-548, n. 30, 549-550, 555, 559, n.40, 559-560.[6]

In keeping with *Bell*, *Jones*, *and Pell*, the *Turner* Court placed the burden for adducing the "ready alternatives" evidence squarely on the claimant. *Turner*, 482 U.S. at 91; *cf.*, *Jones*, 433 U.S. at 128; *Bell*, 441 U.S. at 560-561. Even where the inmate claimant discharged that burden, the *Turner* Court explained that such a showing would not necessarily be determinative; rather, it raises a permissible inference: "a court may consider [the proffered alternatives] as evidence that the

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[6] *Bell* also held the detention facility practices, including the strip search policy, against an "irrationality" standard. 441 U.S. at 555. This Court stated that "it is enough to say [facility administrators] have not been conclusively shown to be wrong in this view." *Id.* (*quoting Jones*, 433 U.S. at 132). "There simply is no basis in this record for concluding that MCC officials have exaggerated their response to these serious problems or that this restriction is irrational." *Bell*, 441 U.S. at 555. The use of strip searches "has not been shown to be irrational or unreasonable." *Id.* at 559 n.40.

regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91.

Having articulated the "valid, rational connection" standard, this Court in *Turner* then applied it to prison regulations governing correspondence and marriage. This Court upheld the correspondence regulation and invalidated the marriage restriction. *Id.* at 93, 99.

In *O'Lone v. Shabazz*, this Court upheld a prison restriction that made the observance of a particular religious practice virtually impossible. The *O'Lone* Court recognized that the First Amendment right to Freedom of Religion survived incarceration. In considering the prison policy, the Court began, "[w]e recently restated the proper standard [of review for prison policies]: 'When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 349 (*citing Turner*, 482 U.S. at 89). *O'Lone* had earlier explained that "both . . . the fact of incarceration and . . . valid penological interests" could limit prisoners' exercise of retained constitutional rights. *O'Lone*, 482 U.S. at 348. In lending definition to "valid penological interests," the Court said they included, "deterrence of crime, rehabilitation of prisoners, and institutional security." *Id.*

This Court rejected the standard formulated by the Third Circuit Court of Appeals which required findings that the policy was, "intended to serve, and [does] serve, the important penological goal of security,

and that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems." *Id.* at 348 (*quoting Shabazz v. O'Lone*, 482 F.2d 342, 347 (3rd Cir. 1986)). In dismissing the heightened standard developed by the Third Circuit, this Court also rejected a standard developed by the Second Circuit Court of Appeals which applied a valid, rational connection standard only to policies directed at activities that were determined to "presumptively dangerous." *Id.* at 290 n.2. Quoting *Turner*, this Court said, "the determination that an activity is 'presumptively dangerous' appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards for review." *Id.* (*quoting Turner* 482 U.S. at 88, 90-91 n. 2).[7]

O'Lone concluded by applying the factors set forth in *Turner* and concluded that the policies passed

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[7] The *O'Lone* Court noted that the "presumptively dangerous" standard was first articulated by the Second Circuit of Appeals in *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985). 482 U.S. at 350. In rejecting further application of this standard, *O'Lone* stated, "[n]or are we convinced that heightened scrutiny is appropriate whenever regulations effectively prohibit, rather than simply limit, a particular exercise of constitutional rights. As *Turner* makes clear, the presence or absence of alternative accommodations of prisoners' rights is properly considered a factor in the reasonableness analysis rather than as a basis for heightened scrutiny." 482 U.S. at 350 (citation omitted).

muster. *Id.* at 350-353. The Court observed that, "the District Court decided that the regulations alleged to infringe constitutional rights were reasonably related to legitimate penological objectives. We agree with the District Court and it necessarily follows that the regulations in question do not offend the Free Exercise Clause of the First Amendment to the United States Constitution." *Id.* at 353.

In subsequent cases, this Court applied the *Turner* factors to other constitutional challenges. In *Washington v. Harper*, 494 U.S. 210 (1990), this Court held that prison policies requiring the administration of antipsychotic medicines to a prisoner against his will met both substantive and procedural due process requirements. After confirming that the policy of the State of Washington had created a liberty interest, the Court stated that, "[w]e have no doubt that, in addition to the liberty interest created by the State's policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 1036. This Court then stated that, "even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would be required to satisfy a more rigorous standard of review," where a prison regulation infringing on that right is concerned, the question remained, "whether the regulation is 'reasonably related

to legitimate penological interests.'" *Id.* at 223 (citing *Turner*, 482 U.S. at 89).

Notwithstanding the significance of the liberty interests proved by the claimant, the *Harper* Court noted that the claimant's potentially violent character absent the "unwanted" medicine triggered an additional rationale supporting the prison regulation. As the Court stated, "[w]e confront here the State's obligations, not just its interests. The State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their medical interests, but also with the needs of the institution." *Harper*, 494 U.S. at 223. Prison administrators, the Court observed, "have not only an interest in ensuring the safety of prison staffs and personnel . . . but the duty to take reasonable measures for the prisoners' own safety." (citing *Hewitt v. Helms*, 459 U.S. 460, 473 (1983)).

III. THE APPLICATION OF *HUDSON* AND *TURNER*.

The application of *Hudson* and *Turner* have to follow in turn. *Hudson* considers whether Fourth Amendment rights survive incarceration. In the case of strip or visual body cavity searches of arrestees this Court should find that this right does not survive incarceration. If this Court finds that arrestees continue to be protected by the Fourth Amendment, this Court should apply the deferential standard outlined in *Turner*

to find that the policy of strip and visual body cavity searching arrestees is Constitutional. *See also, Overton v. Bazetta* 539 U.S. 126 (2003) (applying the *Turner* factors to prison regulations that restricted inmates' visitation rights).

A. Under *Hudson* The Interest of an Arrestee in Not Being Strip Searched Yields to the Paramount Interest of the Jail.

Applying the *Hudson* expectation of privacy test, the interest of an arrestee in the privacy of his or her body is outweighed by the paramount interests of the jail. While *Hudson* concerned cell searches, the same analysis should apply to strip and visual body cavity searches of arrestees. The interest of the arrestee in the privacy of his or her body is greater than the interest in the privacy of a cell, but this right should still yield to the greater interests of the jail. The jail's interest in institutional security does not diminish because an arrestee is involved, as opposed to a pretrial detainee or sentenced inmate, and it does not vary depending on the crime for which the arrestee was charged. *See* infra, section III(C) (discussing why arrestees charged with minor crimes still pose a significant threat to institutional safety and security). The jail's interest is just as great when an arrestee enters the jail. This is a major point at which the jail has contact with the outside

and poses a significant risk that contraband may be introduced into the jail. Once inside the jail, arrestees will have interactions with corrections officers, as well as possibly interacting with other arrestees, detainees and sentenced inmates. A jail's interest in strip searching arrestees should be considered de facto reasonable under the Fourth Amendment because of the paramount interest of the jail in security.

B. Under *Turner* a Jail Policy of Strip Searching All Arrestees Upon Entry to Jail is Constitutional.

The *Turner* standard applies to constitutional "rights that are inconsistent with proper incarceration." *Johnson v. California*, 543 U.S. 499, 510 (2005). "This is because certain privileges and rights must necessarily be limited in the prison context." *Id.* Fourth Amendment rights are included within those rights that must be limited by incarceration. *See Bell*, 441 U.S. at 560; *Hudson*, 468 U.S. at 526. Therefore, the standard outlined in *Turner* should be applied to jail strip and visual body cavity search policies. Applying the *Turner* standard to these policies demonstrates that the strip and visual body cavity searches of arrestees pass constitutional muster.

The *Turner* standard is essentially a rational basis test which requires consideration of whether there is a "valid rational, connection . . . between the prison

regulation and the legitimate governmental interest." 482 US at 89-90. Another factor is the impact of accommodating the asserted right on "guards and other inmates, and on the allocation of prison resources generally." *Id.* "Finally, the Petitioner bears the burden of producing evidence of obvious, easy alternatives to the challenged regulation. *Id. at 90.*[8]

There is a valid, rational connection between a strip search policy that dictates that all arrestees be strip searched upon intake and the legitimate governmental interest of security. The jail has a legitimate penological/governmental interest in jail security. By taking one into custody against his or her will, the federal government, state or municipality takes on a broad spectrum of responsibilities toward that person. Speaking to those obligations, this Court has observed,

> [w]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being . . . . The rationale for this principal is simple enough: when the State

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[8] The *Turner* test also includes consideration of the availability of "other avenues" of exercising the asserted right, but this factor is not implicated in this case.

> by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs – *e.g.*, food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment.

DeShaney v. Winnebago County, 489 U.S. 189, 199-200 (1989). Safeguarding institutional security is the central objective of prison administration. *Bell*, 441 U.S. at 547. "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel." *Id.* Strip and visual body cavity searches serve general jail security interests and are effective in detecting drugs, weapons and contraband on or in the person being searched. *Id.* at 559. An arrestee at intake, independent of the charges against him or her, presents a risk of bringing contraband into a jail. *See infra*, Section III(C) (discussing why arrestees charged with minor crimes still pose a significant threat to institutional safety and security). This risk is at least as great as the risk that contraband will be introduced into the jail at a supervised contact visit which was found to be constitutional in *Bell*.

Restricting strip and visual body cavity searches of arrestees impacts the security and safety of jails. This

in turn impacts the safety of corrections officers, as well as other arrestees, detainees and convicted inmates. While certain new technology may be an adequate substitute for visual searches in some cases, it will strain or be beyond the resources of many smaller jail facilities. Under the outcome desired by Petitioner, these jails will not have the benefit of the technology, and will be foreclosed from conducting visual searches. Visual strip and body cavity searches are not only effective, but are also easy to implement in the variety of penal institutions throughout the country.

There is no substantial evidence of an "obvious, easy alternative" on record in this case. The Petitioner suggests a metal detector and Body Orifice Screening System (BOSS chair) as alternatives. This court has already rejected the metal detector because it is "not . . . as effective as the visual inspection procedure. Money, drugs, and other nonmetallic contraband still could easily be smuggled into the institution." *Bell*, 441 U.S. at 559. The BOSS system fails under the same analysis because the BOSS chair only detects metal objects, not drugs or non-metallic objects and there is no evidence on the efficacy of this technology. *See Florence v. Bd. Of Chosen Freeholders of Burlington*, 621 F.3d 296, 310 (3d Cir. 2010). The Petitioner has not met his burden of establishing the presence of obvious, easy alternatives.

Based on the record, the Petitioner has not met her heavy burden under *Turner* of showing that the Respondents have exaggerated their response to

genuine and legitimate security considerations that resulted in the searches challenged in this case. For this reason a jail policy of subjecting arrestees to strip and body cavity searches is constitutional.

C. The *Turner/Hudson* Analyses Should Not Depend On The Offense For Which A Person Is Arrested Because Arrestees Who Are Arrested On Minor Crimes Still Pose A Significant Threat To Institutional Safety And Security.

Courts have recognized that the offense for which a person is stopped is not a guarantor that that person (or those in his or her company) does not pose significant risks to the safety of officers or the public or that the person does not possess illicit items. Search and seizure cases abound with instances in which stops for minor offenses result in the discovery of dangerous or illicit items as well as dangerous persons. This Court has recognized that even traffic stops can, and frequently do, involve life-threatening dangers. In *Pennsylvania v. Mimms*, this Court cited an authority for the statistic that, "approximately 30% of police shootings occurred when a police officer was approaching a suspect seated in a vehicle." 434 U.S. 106, 110 (1977) (citation omitted). In *Mimms*, this Court made it clear that it had once rejected and rejected again, "the argument that traffic violations necessarily involve less danger than other

types of confrontations."[9] *Id.* (*citing United States v. Robinson*, 414 U.S. 218, 234 (1973)). In that case, a driver was stopped for an expired license and a pat down search revealed a concealed revolver for which the driver did not have a license or permit.

Other cases have borne out this Court's concern in *Mimms*. See, *e.g.*, *Ohio v. Robinette*, 519 U.S. 33 (1996) (driver stopped for speeding, search reveals marijuana and methylenedioxymethamphetamine pill); *Florida v. Bostick*, 501 U.S. 429 (1991) (bus passenger stopped without articulable suspicion, search of luggage reveals cocaine); *Illinois v. Lafayette*, 462 U.S. 640 (1983) ("altercation" with theater owner, search of "purse-type shoulder bag" reveals 10 amphetamine pills in a cigarette package); *New York v. Belton*, 453 U.S. 545 (1981) (the police stopped a driver for speeding, find cocaine in the jacket pocket of a passenger); *Robbins v. California*, 453 U.S. 420 (1981) (driver stopped for erratic driving, marijuana found in container in rear of vehicle); *Delaware v. Prouse*, 440 U.S. 648 (1979) (driver stopped for no reason found in possession of marijuana); *United States v. Gilyard*, 261 F.3d 506, 508 (5th Cir. 2001) (driver stopped for following too closely, six "bricks" of cocaine found in vehicle); *United States v. McVeigh*, 153 F.3d 1166, 1178 (10th Cir. 1998) (truck stopped for

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[9] *Cf.*, *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) ("the assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable.").

missing license plate, driver discovered to be terrorist bomber).

The frequency with which traffic stops result in the discovery of weapons, drugs or other dangerous or illicit items prompted one court to observe that "arrested traffic offenders, as a group, could include people who have communicable diseases, people who use drugs and might be carrying them in concealed areas on their body, or people who use weapons and might be carrying them on their body. Traffic offenders run the whole gamut of society." *Giles v. Ackerman*, 559 F.Supp. 226, 228 (D.Idaho 1983), *reversed*, *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984).

Some of the strip search cases involve facts in which persons stopped for a seemingly unrelated offense (or in the company of someone else who has been stopped) have been found in possession of some suspect or illegal item. *See, e.g., Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997) (male stopped for suspected shoplifting, female passenger discards baggie containing marijuana); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1434 (10th Cir. 1989) (initial investigation for shoplifting leads to arrest of three defendants, two not initially suspects, marijuana found in squad car that transported arrestees to station house, and roach clip found on person of one arrestee).

These cases demonstrate that persons subjected to sudden and unexpected detention or arrest premised on minor offenses may pose serious risks to the officer,

the public, and even themselves or may possess illicit or dangerous objects. Protecting against such risks is a constant of Fourth Amendment law.

This Court recognized the same risks exist in a police department stationhouse. *Illinois v. LaFayette*, 462 U.S. 640 (1983). The *Lafayette* Court acknowledged that, "[a]rrested persons have been known to injure themselves – or others – with belts, knives, drugs, or other items on their person while being detained." *Id.* at 640. The Court continued by explaining that, "[d]angerous instrumentalities – such as razor blades, bombs or weapons – can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by the police to limit these risks—either while the objects are in police possession or at the time they are returned to the arrestee upon his release." *Id.* at 646.

The risks encountered in a jail include extreme violence. In *Logan v. Shealy*, a blanket strip search policy was initiated after a misdemeanant who had not been strip searched shot a deputy. 660 F.2d 1007, 1013 (4th Cir. 1981). *Feeley v. Sampson* noted that a guard at the Rockingham County Jail had been murdered by a pretrial detainee. 70 F.2d 364, 367 (1st Cir. 1978). *Feeley* also noted that pretrial detainees also "more regularly engage[d] in incidents such as fights, arson, and like." *Id.*

An arrestee subjected to an "unplanned" arrest, might be caught in possession of an item that is either illegal itself, such as drugs or which is illegal given the arrestee's status, such as a felon in possession of a firearm. Under such circumstances, the arrestee may attempt to discard the item but, of course, it is possible that the arrestee will not have an opportunity to do so. Jail intake officials must consider that arrestees may possess such items which, in the heat of the arrest, they were unable to discard.

In one case, a glass vial containing a white powdery substance fell from an arrestee's pocket while the arrestee was being strip searched. *New Jersey v. Sheppard*, 483 A.2d 235, 237 (N.J. 1984). This arrestee was stopped for an expired inspection sticker and arrested for driving without a license. *Id.* In two other cases, it appears that arrestees, not having planned on their arrests, were apprehended with illicit substances, which they attempted to discard. In *Swain*, after the claimant emerged from the vehicle in which she and her boyfriend were stopped, police found a baggie of marijuana near her on the ground. The *Swain* Court assumed that it belonged to her. 117 F.3d at 10. It is a reasonable inference that she was trying to jettison it. Similarly, in *Lusby v. T.G. & Y. Stores, Inc.*, three men were arrested following an altercation in which one of them had been mistakenly accused of shoplifting. After they were taken into the police station, marijuana was found in the police cruiser in which they had been

transported and a roach clip was found on one of the arrestees. 749 F.2d at 1434. Again, it is reasonable to assume that because their arrest was unplanned, they attempted to discard the marijuana because they knew that it could result in additional charges entirely unrelated to the offense for which they had been arrested.[10]

In *Shain v. Ellison*, the Second Circuit asserted that, "[i]t is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices." 273 F.3d 56, 64 (2d Cir. 2001). It observed that, "[u]nlike persons already in jail who receive contact visits, arrestees ordinarily do not have notice that they are about to be arrested and thus an opportunity to hide something." *Id.* The *Shain* Court implicitly acknowledged that an arrestee, even one

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[10] *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001), concerned an arrestee who was apprehended on an invalid warrant. Rhode Island's A.C.I. is a "unified" institution as Rhode Island has no regional facilities in which to detain prisoners before trial. *Roberts v. Rhode Island*, 175 F.Supp. 2d 176, 181 (D.R.I. 2000). A.C.I. officials submitted an affidavit in which it advised that corrections officers had found cocaine in a plastic bag in the mouth of an inmate. *Roberts*, 239 F.3d at 112 n.6. The presence of drugs in an arrestee's mouth at the A.C.I. could be interpreted as a deliberate attempt to smuggle or, given the likelihood that the arrest was "unplanned," could also be interpreted as a last ditch attempt to hide drugs which, in the course of arrest and transport to jail, the arrestee had been unable to jettison. Neither the trial court nor the circuit provided any further information on this incident.

arrested for a minor offense, might possess drugs, weapons or contraband which the arrestee might conceal given the opportunity. Here, *Shain* recognized "exceptions" giving as an example, "a person who is allowed to visit the bathroom unescorted before an arrest—reasonable suspicion may well exist." *Id.* By raising this possibility, *Shain* appeared to suggest that a person who is about to be arrested might have a motivation to either jettison an item or to conceal it on his or her person. The privacy of a bathroom might serve that purpose. *Shain* did not raise the possibility that one who is arrested and is denied a pre-arrest visit to the bathroom might still possess an item that he or she would wish to conceal and that an unescorted post-arrest visit to the bathroom might raise the same risks.[11]

In addition, depending on the jail's definition of "contraband," virtually anything that an arrestee possesses can become contraband if the arrestee attempts to bring it into the jail without authorization. It

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[11] In *Swain*, the claimant was permitted to use the bathroom without being continually observed. 117 F.3d at 3. The *Swain* Court cited this interruption in observation of the claimant as evidence that the prosecuting officer was not actually concerned that the claimant possessed illicit items which she might have jettisoned in the bathroom. *Id. at* 8. In another case , however, the observation of a female detainee urinating by a police matron was found to have violated the arrestee's Fourth Amendment privacy rights. *Wilkes v. Clayton*, 696 F. Supp. 144, 150 (D.N.J. 1988), *accord DiLoreto v. Oaklyn*, 744 F. Supp. 610, 621 (D.N.J. 1990).

is unclear what might motivate a person to smuggle otherwise legal items into a jail. As was noted by the Second Circuit in *N.G. v. Connecticut*, at least one detainee smuggled a paperclip into a place of confinement for purposes of self mutilation. 382 F.3d 225, 234 n.12 (2d Cir. 2004).

In *Bull v. San Francisco*, "strip searches . . . uncovered significant amounts of contraband hidden in and on arrestees' bodies." 595 F.3d 964, 969 (9th Cir. 2010). This contraband included numerous types of drugs and weapons and was found "on arrestees charged with a range of offenses, including non-violent offenses such as public drunkenness, public nuisance, and violation of a court order." *Id.* This case law demonstrates that the offense charged is not an accurate indicator of the risks posed by arrestees. Even those arrestees charged with minor infractions, such as a violation of traffic laws, may still pose a significant risk to institutional security. For this reason, strip search jurisprudence should not be based on the offense charged.

IV. THE CATEGORICAL APPROACH TO STRIP SEARCH POLICY IS DESIRABLE.

Hudson and *Bell* contrast with traditional Fourth Amendment analysis in that both implicitly rejected a "case-by-case" review for the determination of such rights and instead ruled categorically that prisoners did

not retain Fourth Amendment-sanctioned expectations of privacy under the circumstances presented. *Bell* ruled categorically that prisoners returning from contact visits, irrespective of the status of the charges against them, could be subjected to strip and body cavity searches without requiring jail officials to possess any level of suspicion that they might be harboring drugs, weapons or contraband. 441 U.S. at 560. *Hudson* also reached a categorical result with regard to cell searches. 468 U.S. at 529. These rulings provided corrections officials with clear, readily administrable guidelines by which to judge such searches. "[T]he government's compelling interest in prison safety, together with the necessarily ad hoc judgments required of prison officials" support the use of the categorical approach in this case. *See Hudson*, 468 U.S. at 537-38 (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the Third Circuit.

Respectfully submitted,

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August 26, 2011

AMICUS CURIAE BRIEF

No. 10-945

RECORD

In The
Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF AMICI CURIAE OF MEDICAL SOCIETY OF NEW JERSEY, THE CENTER FOR PRISONER HEALTH AND HUMAN RIGHTS, AND MEDICAL EXPERTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances.

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1766, *amicus curiae* the *Medical Society of New Jersey* (MSNJ) is the oldest professional society in the United States. The organization and its dues-paying members are dedicated to a healthy New Jersey, working to ensure the sanctity of the physician–patient relationship. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, for the delivery of the highest quality medical care. This allows response to the patients' individual, varied needs, in an ethical and compassionate environment, in order to create a healthy Garden State and healthy citizens.

Amicus curiae The Center for Prisoner Health and Human Rights (CPHHR) is a collaboration of doctors, social workers and allied health staff from a variety of medical disciplines with the common mission of preserving the basic rights and needs of individuals detained in correctional systems, both in the United States and abroad. With a history of providing medical care for inmates dating back to 1986, CPHHR was formally created in 2005 to further promote quality medical care for inmates, as well as research and education about correctional healthcare. CPHHR is also committed to advocacy for prisoners in particular towards securing basic

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Parties have provided written consent, on file with the Court, to the filing of briefs in support of either, or neither party.

protections such as access to care, safety and humane treatment.

Amici Dr. Scott Allen, Dr. Curt Beckwith, Dr. Charles Carpenter, Dr. Jennifer Clarke, Dr. Joanne Csete, Dr. Susan Cu-Uvin, Dr. Anne De Groot, Dr. Peter Friedmann, Dr. Lorie Smith Goshin, Dr. Jennifer Johnson, Dr. Michelle Lally, Dr. David Lewis, Dr. Amy Nunn, Dr. Susan Ray, Dr. Josiah Rich, Dr. David Rimland, Dr. Michael Stein, Dr. Lynn Taylor are trained medical and public health professionals with combined centuries of experience in screening, identifying, and treating infectious diseases and advancing medical scholarship on proper protocols and methods for public and correctional health care. Appendix A to this brief is a list of *amici* doctors, with institutional affiliations provided for identification purposes only.

Amici respectfully submit the following brief to highlight the consensus of infectious disease and public health experts on communicable disease in correctional facilities. Among the various advocated approaches in the medical community to infectious disease epidemics in correctional facilities, casual visual inspections incidental to a security strip search is not one of them.

Amici urge the Court to hold that detecting skin disease or infection is not a valid justification for non-medically trained officers to strip search all arrestees upon intake to a jail. Because ordering people to strip naked and commanding them to expose their genitals and buttocks for inspection is so intrusive into personal liberty, the jails have a heavy burden providing adequate justification for this practice. The Burlington County Jail and the Essex County Correctional Facility contend that one

justification for their 'blanket strip search' policies is to check new inmates for signs of skin disease and infection. Their argument—as it pertains to medical or health care, rather than institutional security—deserves no deference. Furthermore, a strip search conducted by non-medical personnel for security purposes has little connection to the procedures used during a bona fide skin exam. Such searches undermine, or at best distract from, consistent policies to address the root cause of infectious disease epidemics in correctional facilities.

ARGUMENT

I. PURPORTED MEDICAL OR PUBLIC HEALTH "EXPERTISE" OF PRISON OR JAIL ADMINISTRATORS MUST BE AFFORDED NO JUDICIAL DEFERENCE

Traditionally, courts have adopted a "broad hands-off attitude" toward problems of prison administration. *See Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). However, the grant of deference is qualified by a plain view to "legitimate goals and policies" of the prison—not bogus justifications. *See Bell v. Wolfish*, 441 U.S. 520, 546 (1979) ("the legitimate goals and policies of the penal institution limits . . . retained constitutional rights") (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977)); *see also Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) ("must balance the inmate's interest . . . against the needs of the prison"). This Court does indeed recognize that institutional operations of correctional facilities require "difficult judgments." *See Jones*, 433 U.S. at 128 ("necessary

and correct result of . . . deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations"). At the same time, however, prisoners retain constitutional rights and administrators are not given carte blanche to arbitrarily pin the justification for impeding constitutional rights on a whim—for example, casual visual inspections for infectious diseases incidental to a security based search. *See Wolff*, 418 U.S. at 555-56 ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *see also Bell*, 441 U.S. at 545 ("convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison"); *see also id.* (explaining that pretrial detainees retain at least the same level of constitutional protection as enjoyed by convicted prisoners).

Of course, the core rationale for deference is to ensure prison administrators can accomplish their "central objective[:] . . . safeguarding *institutional security*." *See id.* at 547 (emphasis added); *see also Jones*, 433 U.S. at 137-38 (clarifying that prison administrators deserve deference on security questions because administrators have "the most expertise in [that] field"). However, haphazard visual inspections, searches that only nominally are medically appropriate, serve absolutely no penological purpose for a correctional facility. *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) ("denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose"). Thus, where a prison administration employs some alternative non-security justification for violating constitutional rights, such as public health or medical necessity, this Court should only

warily extend deference. Medical determinations formulated by correctional administrators whose primary task and expertise lies in *security* matters ought to be viewed not with any deference, but a strong dose of healthy skepticism. *See Jones*, 433 U.S. at 128-32 (qualifying discretion of prison administrators due deference as that which is well informed, reasonable, and responsible).

II. STRIP SEARCHES AT INTAKE ARE A COUNTERPRODUCTIVE AND POOR STRATEGY FOR SURVEILLANCE, SCREENING, INTERVENTION, AND PREVENTION OF MRSA

Skin and soft tissue infections (SSTIs) are "the inheritance of every jail and prison." *See* Deger, *et al.*, *The Enduring Menace Of MRSA: Incidence, Treatment, And Prevention In A County Jail*, 15 J. CORRECT. HEALTH CARE 3, 174, 177 (2009). Influenced by a variety of indicators, including poverty, homelessness, crowding, mental illness, lack of education, drug use, and skin and health conditions, SSTIs run rampant in correctional facilities. *See id.* National trends and local studies confirm that close to 70% of SSTIs are Methicillin-resistant *Staphylococcus aureus* (MRSA). *See id.* ("MRSA is the most common cause of SSTIs . . . consistent with national trends"). Because of MRSA, the Burlington County Jail and Essex Correctional Facility should be alert to inmate wounds but in a medical, not a security, context. Using security motivated strip searches to detect skin infections is not in line with recommended medical practices and ignores the root causes of MRSA transmission.

A. Checking New Inmates For MRSA Is A Bogus Justification For The Blanket Strip Search Policy Because Current Strip Search Methods Are Ineffective At Detecting MRSA.

The Board of Chosen Freeholders for Burlington County and the Burlington County Jail ("BCJ") argue that one justification for a blanket strip search policy is to conduct "a visual inspection for sores and other indicia of illness." Brief in Opposition for Board of Chosen Freeholders et al. *Florence v. Board of Chosen Freeholders*, No. 10-945, at 4 (2011) [hereinafter "BCJ Brief"]. BCJ claims that these inspections protect other inmates by preventing contact with newly arrived inmates who present symptoms of skin disease. BCJ claims that failure to screen new inmates for skin disease implicates the Eighth Amendment because the jail has an obligation to protect the health of all the detainees in its care. *See id.* at 20. The Essex County Correctional Facility ("Essex") notes the BCJ brief's medical justification as a reflection of its own reasons for strip-searching. Brief in Opposition for Essex County Correctional Facility et al. in *Florence v. Board of Chosen Freeholders*, at 7, No. 10-945 (2011). This medical justification cited by BCJ and Essex is disingenuous and improper.

While it is agreed that the BCJ and Essex are responsible for the health and safety of their inmates, the strip searches to which the plaintiff was subjected had none of the characteristics of a bona fide skin examination conducive to effective SSTI

identification or prevention. The rudimentary manner in which officers at BCJ and Essex conduct a visual skin inspection, as incidental to a security motivated strip search, has no medical validity that could outweigh the extreme intrusion into protected Fourth Amendment rights and personal dignity. First, an effective screening for SSTI's would include taking a medical history and questioning the inmate about his health and skin conditions and assessing his risk factors for SSTI's before and during an exam. Second, a good faith screening for SSTIs would include measures to ensure the new inmate's good hygiene, including ample opportunities to wash and to learn about preventing infections.

1. *A Bona Fide, Effective MRSA Screening Would Include A Medical History And An Assessment Of Risk Factors By Trained Personnel.*

The effective and efficient way to screen inmates for SSTIs, including MRSA, would include a medical questionnaire, an assessment of risk factors and a focused inspection and evaluation of any lesions on the skin by healthcare professionals. If BCJ and Essex were sincere in their policy of searching for SSTIs, their officers would treat a skin examination as a distinct, careful inspection independent from a security based search. In a security strip search, examination of the skin is cursory at best because the primary focus is on spotting contraband. Instead of following any of the medically recommended steps for detecting SSTIs and MRSA, BCJ and Essex's approach to supposedly

detecting SSTIs is merely incidental to their overall visual search: eyeballing naked inmates from several feet away. Neither Essex nor BCJ provide any medical support in their briefs for the validity of SSTI detection as incidental to a security search. A review of the medical literature on the topic reveals that the Jails' approach has no foundation in good medical practice because it does not take into account the inmate's medical history and risk factors and because it is not conducted by personnel trained to identify skin disease.

a. *A Bona Fide Skin Exam Takes Into Account Medical History And Risk Factors*

Numerous state and federal agencies and medical organizations have published guidelines for healthcare workers, athletic trainers and coaches, hospital workers, and correctional facility staff for detecting signs of SSTIs and MRSA. For example, in April 2011, the Federal Bureau of Prisons ("BOP") released updated medical guidelines for controlling MRSA infections.[2] These guidelines recommend providing skin screenings on intake that include, encouraging inmates to self-report skin problems. Federal Bureau of Prisons, CLINICAL PRACTICE GUIDELINES: MANAGEMENT OF METHICILLIN-

[2] The Federal Bureau of Prisons developed its MRSA control guidelines using information from a study published by the Center for Disease Control and Prevention. *See* Center for Disease Control and Prevention, ***Methicillin – Resistant Staphylococcus in aureus Infections in Correctional Facilities – Georgia, California, and Texas 2001 – 2003*** 52 (41) MORBIDITY AND MORTALITY WEEKLY REPORT 992, 993 (2003)

RESISTANT STAPHYLOCOCCUS AUREUS (MRSA) INFECTIONS 2 – 3 (April 2011) [hereinafter "BOP Guidelines"]. The BOP Guidelines recommend obtaining inmate medical history during skin screening which entails asking the inmate about the presence and nature of pain associated with skin lesions and recent medical history. *Id.* at 8. At no point do the BOP guidelines advocate forcibly strip-searching inmates to detect skin infections. *See id.* at 2-3.

A discussion with inmates about their medical history is crucial to properly conducting a skin inspection. The presence of MRSA in particular can more easily be assessed if it is known whether the inmate has established risk factors. Common risk factors include close contact with someone with a known infection; frequent antibiotic use; sharing personal hygiene items such as towels and soap bars with infected persons; a history of past MRSA infections; and recent hospitalizations. *Id.* at 1. The Navy Environmental Health Center also advocates that evaluations for skin lesions must start with an understanding of the person's basic medical history through evaluation of the person's risk factors for MRSA. Navy Environmental Health Center, GUIDELINES FOR THE MANAGEMENT OF COMMUNITY-ACQUIRED METHICILLIN – RESISTANT *STAPHYLOCOCCUS AUREUS* (CA-MRSA) INFECTIONS IN THE US NAVY AND MARINE CORPS 6 (August 2005). Evaluation of SSTIs should include assessment of any lesions, identification of risk factors through questioning, followed by the performance and review of laboratory cultures. *Id.*

A major reason why it is so important to question inmates about their health and skin is that most skin infections, at least in their early stages, do

not look very different from each other. *See* Stevens et al. *Practice Guidelines for the Diagnosis and Management of Skin and Soft-Tissue Infection*, 41 CLINICAL INFECTIOUS DISEASES 1373, 1378 (2005) [hereinafter "IDSA Guidelines"]. Information from the inmates, both regarding their risk factors and personal health, can help place a suspected, but unidentifiable, sore or wound into context. *See id.* A small, red lesion may appear to be a harmless insect bite. However, that same small red, lesion might be cause for further medical referral if the inmate has been involved in a known risk factor, such as unsanitary tattooing, or a recent hospitalization. As the Infectious Disease Society of America's *Practice Guidelines for the Diagnosis and Management of Skin and Soft Tissue Infections* notes, "obtaining a careful history, including information about the patient's immune status, the geographical locale, travel history, recent trauma or surgery, previous microbial therapy, lifestyle, hobbies, animal exposure or bites is key to developing an adequate differential diagnosis and an appropriate index of suspicion." *Id.* Such a careful clinical assessment is important because an incorrect initial diagnosis and treatment can lead to therapy failure, or, in the case of new inmates, may result in serious infections being overlooked entirely. *Id.*

Finally, it should be noted that skin examinations of all inmates, even those conducted for bona fide medical purposes, are generally recommended when there has been an actual outbreak[3] of MRSA in the facility. *See* BOP

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[3] An outbreak occurs when "similar antibiotic susceptibility patterns are identified among two or more MRSA isolates from epidemiologically linked patients." BOP Guidelines at 12.

Guidelines at 12. Even in the outbreak scenario, *en masse* strip searching has not been the recommended way to control the spread of the disease. Less intrusive measures have been successfully employed to identify cases during outbreaks, and these, unsurprisingly, have revolved around questioning the inmates themselves. A 2003 study of a MRSA outbreak at a Georgia jail, for example, successfully relied on 193 self-reported questionnaires to locate the inmates with MRSA in the facility. *See* Wooten et al., *Intervention to Reduce the Incidence of Methillicin-Resistant Staphylococcus aureus Skin Infections in a Correctional Facility in Georgia*, 25 (5) Infection Control and Hospital Epidemiology 402, 404 (May 2004). Meanwhile jails around the country have used practices such as conducting medical skin screens while the inmate is in underwear, steam-cleaning jail cells, and increasing the availability of hand sanitizers to combat infections, none of which are integrated into a security motivated strip search. *See* United States Department of Justice, NATIONAL INSTITUTE OF CORRECTIONS, PROCEEDINGS OF THE LARGE JAIL NETWORK MEETING 10 (Spring 2008).

There is absolutely no evidence in the BCJ and Essex opposition briefs that officials at either BCJ or Essex made any effort to learn from the plaintiff whether he had any wounds, pain, or swelling anywhere on his body. They did not ask him whether he engaged in any practices that put him at risk for MRSA, nor did they inquire from him about whether he had had any recent hospitalizations. The absence of questioning meant that if the officers did spot any abnormalities on his skin, they would have had no context with which to seriously evaluate them. The record indicates that the officers at BCJ and Essex ordered the plaintiff to strip, and then

followed with a series of commands to expose areas of his body. They did not even explain to him that they were also checking him for skin infections. The lack of questioning and explanation is a clear indication that detecting skin disease was not, in reality, a priority for the strip searches.

b. A Bona Fide Skin Exam Would Be Conducted By Trained Personnel

As a threshold matter, The National Commission on Correctional Health Care ("NCCHC"), which issues guidelines for healthcare screening on intake to jails, does recommend that jail officers, who are *trained*, can "check[] each entering inmate for immediate need of medical attention and ask[] about any urgent health needs." *The Most Important Standard: Receiving Screening*, National Commission on Correctional Healthcare, www.ncchc.org/resources/spotlight/18-3.html (last visited June 21, 2011). The ideal is for healthcare professionals to conduct the screening, but such initial screening by officers on intake is helpful to jail medical staff in identifying new inmates with possible health problems. *See id.* Officers can look for obvious potential signs of illness, follow-up with the inmate through health-related questioning, and refer inmates to proper services.

However, this recommendation in no way implies that such a check involves a full body security strip search conducted for the primary purpose of interdicting contraband. Nor does it suggest that untrained officers should be examining the inmates at all, much less for specific types of

illnesses, such as complex skin diseases. The policy at issue in this case deals specifically with *strip searching* new inmates by officers conducting a search in a security, not medical, capacity.

Proper training is crucial to detecting skin infections and other indicia of illness. Dangerous and contagious SSTIs, like MRSA, are not easily recognizable in their early stages. In particular, it is problematic to differentiate between a cellulitis that should respond to antimicrobial treatment alone and a necrotizing infection that requires operative intervention. IDSA Guidelines, *supra* at 1383. A careful, medical inspection of the skin is therefore crucial to effective containment of MRSA and other SSTIs. Trained professionals should be conducting the search because the potential for mistakenly identifying the symptoms of MRSA with another SSTI is great.

Training in the different treatment options for various SSTIs would include studying the potential implications of skin lesions of various sizes and presentations. *See e.g.* BOP Guidelines, *supra* at 8. For example, patients with skin lesions smaller than 5cm, without accompanying cellulitis and no systemic signs and systems, should receive only conservative treatment, such as warm soaks and compresses. *Id.* Those with larger lesions should receive oral antibiotics, but if these lesions are accompanied by cellulitis, they should receive further assessment along with the antibiotics. *Id.* Meanwhile, inmates whose lesions are accompanied by systemic signs and symptoms should be hospitalized. *Id.* There is no evidence either in the record or in the BCJ or Essex briefs that indicate the officers involved had any such training in SSTI identification or treatment.

Trained personnel would also be expected to understand that there is a great deal of overlap in the clinical presentation of different skin infections and "in the initial phases, distinguishing between a cellulitis that should respond to antimicrobial treatment alone and a necrotizing infection that requires operative intervention may be difficult." IDSA Guidelines, *supra* at 1383. Again, a combination of knowledge about the disease and how it presents, alongside an understanding of the medical history and risk factors of the patient, is necessary to proper inspection for MRSA and other SSTIs. "Recognizing the physical examination findings and understanding the anatomical relationships of skin and soft tissues are also crucial for establishing the correct diagnosis," and so the need for a serious, medical approach to skin exams conducted by medically trained personnel is particularly required given the danger of missing the signs of severe infection. *Id.* at 1378. The overlap in presentation between different SSTIs, especially between deadly and innocuous ones, is an area where a bona fide skin inspection policy would be essential.

Officers involved in a good faith effort to detect disease would have been able to identify different types of skin lesions, and would have used that training in a thorough exam of the skin upon intake. In this case, however, there is no documentation that officers seriously inspected the skin, or looked for and evaluated signs of infection. In fact, at Essex, two officers visually inspected five naked men at one time. Petition for Writ of Certiorari, *Florence v. Board of Chosen Freeholders*, No. 10-945, at 7 (2011) [hereinafter "Cert. Petition"]. Glancing over five men at once is not a realistic method of professionally detecting skin disease. Rather, it is further evidence

that the Jails' were not effectively using security strip searching to catch disease and that the medical justification for strip searching is merely an unfounded, post-hoc rationalization that makes little medical sense.

2. A Good Faith Effort Screening For SSTI's Would Include Ensuring The New Inmate Ample Opportunity To Maintain Good Hygiene And To Receive Information About Preventing The Disease

It is mainstream, scientific and medical fact that poor hygiene exacerbates SSTI and MRSA wounds and increases transmission risk to other people. Describing outbreaks of MRSA in Texas, California, and Georgia jails, the Center for Disease Control and Prevention ("CDC") cited barriers to inmate hygiene as contributing factor to its spread in the jail. *See* Center for Disease Control and Prevention, *Methicillin – Resistant Staphylococcus in aureus Infections in Correctional Facilities – Georgia, California, and Texas 2001 – 2003* 52 (41) Morbidity and Mortality Weekly Report 992, 993 (2003) [hereinafter CDC 2003 study]. In particular, limited access to anti-bacterial soap and clean laundry increased the risk of MRSA's spread. *Id.* Personal hygiene was also identified as a serious cause of MRSA transmission in a published study on efforts by the Georgia Division of Public Health to reduce the incidence of MRSA. *See* Wooten, *supra* at 407. In that study, investigators found it problematic that inmates were provided only one bar of soap, and

credited a policy change allowing soap dispensers in the shower facilities with decreasing MRSA transmission. *See id.* at 405-06.

The fact that bodily filth is causally linked to SSTI spread is why such authorities as the Bureau of Prisons, the Center for Disease Control and Prevention, the U.S. Navy, and various state and local public health agencies emphasize the urgent need to educate inmates about hygiene and to provide inmates with access to clean towels, anti-bacterial soaps, and immediate help for wound care. In the Los Angeles County jail system (the largest in the country), the L.A. County Department of Health Services recommended "enhanced administrative infection-control measures" near the health clinic "to ensure frequent showering and appropriate personal hygiene for inmates." CDC 2003 Study, *supra* at 994. Meanwhile, the BOP explains that "[r]egular handwashing should be emphasized as the most important intervention for preventing a MRSA outbreak." BOP Guidelines, *supra* at 9.

It follows that if BCJ and Essex were actively trying to prevent a MRSA outbreak, they would have made at least a minimal effort to provide inmates with access to hygiene. The opposite is true. Not only did BCJ and Essex fail to take affirmative steps to provide such resources for the plaintiff, but the record reflects that they actually withheld his access to shower facilities for six full days following his arrest. The plaintiff had to wait, day in and day out, in his cell without the opportunity to shower, wash his clothes, or even to brush his teeth. *See* Cert. Petition, *supra* at 5 - 6. In light of these facts, BCJ and Essex's use of MRSA prevention as a justification for strip searching the plaintiff and other inmates is misguided.

B. Strip Searches Fail To Address, And Distract From The Root Causes Of, MRSA Epidemics In Correctional Facilities

Prisons, like hospitals and health facilities before them, are a critical site for public health interventions seeking to stem the tide of community acquired MRSA ("CA-MRSA"). While the 1970's and 1980's saw an emergence of resistance of methicillin among *S. aureus* infections in hospitals, and even in the community, in persons who had a recent health care procedure or contact with someone who had a health care-associated risk factor, it was not until the 1990's and 2000's that CA-MRSA outbreaks became associated with correctional facilities. *See* Malcolm, *The Rise of Methicillin-Resistant Staphylococcus aureus in U.S. Correctional Populations*, J. CORRECT. HEALTH CARE 1, 2 (May 13, 2011).

Every year, 10 million people are processed in correctional facilities throughout America, a number that has grown 300% since 1980. *See* Aiello, *et al.*, *Methicillin-resistant Staphylococcus aureus among U.S. prisoners and military personnel: Review and recommendations for future studies*, 6 THE LANCET INFECTIOUS DISEASES, 335, 335-41 (2006). In the past decade, the CDC noted a high prevalence and noted increase of MRSA infection in correctional populations. *See* Malcolm, *supra* at 2 (citing Centers for Disease Control and Prevention, *MRSA infections in correctional facilities—Georgia, California and Texas, 2001-2003*, 52 MORBIDITY AND MORTALITY WEEKLY REPORT 992, 992 (2003)). Jails, in particular,

are a "critical point of access for care." *See* Miles, *Editor's Letter*, 15 J. CORRECT. HEALTH CARE 173, 173 (2009) ("mental and physical health conditions seen in jails are a reflection of the populations at highest health risk in the community . . . . We need to make the most of this opportunity . . . to foster and support partnerships between jails, public health, and community-based care and service providers . . . . Prevention activities and primary health care in jails benefit not only the incarcerated but also the community at large").

Conditions of correctional facilities are responsible for epidemics of CA-MRSA in jails. Visual body cavity searches hopelessly aim to address only a symptom of the crisis, rather than the root cause. Time spent in correctional facilities is the largest contributor to spread of CA-MRSA, not infusion of the disease from the community. *See* Malcolm, *supra* at 6 ("studies . . . found a positive association between length of exposure to prison and likelihood of MRSA colonization"); *see also* David, *et al.*, *Predominance Of Methicillin-Resistant Staphylococcus Aureus Among Pathogens Causing Skin And Soft Tissue Infections In A Large Urban Jail: Risk Factors And Recurrence Rates*, 46 J. CLINICAL MICROBIOLOGY 3222, 3222-26 (2010) (inmates with *S. aureus* had longer incarceration times than the general incarcerated population). Thus, the "key event is not so much the introduction of MRSA into a facility;" but rather, the transmission and expansion of circulating strains in the facility. *See* Elias *et al.*, *Community-Based Intervention To Manage An Outbreak Of MRSA Skin Infections In A County Jail*, 16 J. CORRECT. HEALTH CARE 205 (2010) (focus needs to be on prevention of transmission due to the low probability of preventing introduction of

MRSA in an endemic situation).

Unless public health interventions against CA-MRSA in correctional facilities are comprehensive and sustained, the epidemic across our nation's prisons will continue to spread. To date, haphazard implementation of preventive measures in correctional facilities has produced "mixed results." *See* Malcolm, *supra* at 9 ("Data suggest that targeted interventions can decrease the risk of acquiring skin infections in a correctional setting . . . . Interventions implemented in the Texas and some of the Georgia facilities may have failed because the interventions were not sustained"). Promotion of irrelevant strip searches is an unfortunate detour from the growing threats of MRSA to communities, particularly when jails "represent a model of the transmission dynamics" that may be "useful in preventing transmission . . . also among people in other closed and crowded living conditions." *See* Aiello, *supra* at 338 (study of MRSA in correctional facilities "would provide a better understanding . . . and ultimately control within these specialized settings").

Moreover, no strip search can even begin to respond to the confluence of risk factors perpetually present within correctional facilities and among inmates for transmission of CA-MRSA. Studies have shown that incarceration itself is a leading risk factor for MRSA. *See* Malcolm, *supra* at 9 (citing Aiello, *supra* at 338) (risk factors included prison occupation, gender, comorbidities, and other demographic conditions); *see also* Malcolm, *supra* at 9 (risk factors include young age, ethnicity, homelessness, and drug use). Furthermore, many risk factors are associated with correctional facilities as well. *See id.* (living or working in crowded conditions, immunosuppression, exposure to

environmental and behavioral factors) (citing Baillargeon, *et al.*, *Methicillin-Resistant Staphylococcus Aureus Infection In The Texas Prison System*, 38 CLINICAL INFECTIOUS DISEASES 92, 92–95 (2004)).

Specific risk factors for CA-MRSA in correctional facilities have been analyzed in peer-reviewed scientific settings. For example, being in a room with another person carrying a MRSA skin infection can increase "substantially" the risk of MRSA transmission. *See Webb, et al., MRSA Prevention and Control in County Correctional Facilities*, 15 J. CORRECT. HEALTH CARE 4 268, 273 (2009) citing Campbell, *et al.*, *Risk Factors For Community-Associated Methicillin-Resistant Staphylococcoccus Aureus Infections In An Outbreak Of Disease Among Military Trainees In San Diego, California, In 2002*, 42 J. CLINICAL MICROBIOLOGY 4050, 4050–53 (2004).

Inadequate medical care and lack of standardized treatment protocols are another root cause of CA-MRSA transmission in correctional facilities. *See* Webb, *supra* at 273 (describing an outbreak in Georgia where antimicrobials were improperly prescribed in 26% of cases and no proper treatment protocols were in place before the outbreak). The value and necessity of standardized treatment protocols "cannot be overstated." *Id.* In a study of San Diego County jail systems comparing infection rates seen prior and subsequent to execution of a standardized treatment protocols, standardized procedures created a marked decrease in MRSA infections. *See* Goldstein, *et al.*, *Impact of a Standardized Protocol to Address Methicillin-Resistant Staphylococcus aureus Skin Infections at a Large, Urban County Jail System*, 12 J. CORRECT.

HEALTH CARE 3 181, 183 (2006).

Tackling MRSA in correctional facilities requires a deep dive into prevention of root causes, rather than hopelessly ineffective casual strip searches. As proven by repeated studies, prevention must encompass a plethora of interventions—including, but not limited to, "daily showering, washing hands frequently, covering all wounds with clean dry dressings, and avoiding sharing towels, clothing and razors." *See* Deger, *supra* at 177 (study of a Washington jail emphasizing the importance of liberally dispensing antibacterial soaps, inmate education regarding picking at furuncles and wounds, frequent hand washing, proper disposal of wound dressings, bleach-washing cells after inmate isolation, and flu vaccinations to prevent lethal necrotizing CA-MRSA pneumonia from following influenza). Only "persistent attention to sanitation" can "keep [the] menace of MRSA at a minimum." *See id.* at 178.

Neither Burlington County Jail nor the Essex County Correctional Facility provide any explanation or support as to how those facilities look for MRSA and other SSTIs during routine strip searches. The idea that checking for skin disease can be seriously accomplished during a security strip search is utterly simplistic. The Jails have offered no evidence of their expertise in this area, and therefore deserve no deference. Moreover, the actual strip search practices at both facilities show that detecting disease was an incidental objective at best. Officers made no effort to assess the plaintiff's SSTI or MRSA risk factors, to gather any medical history, or to ensure his access to hygiene in the days following the search. This slip-shod approach to skin inspection is

not medically effective and, therefore, does not justify the extreme privacy intrusion of examining a person's naked body against his or her will.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

AUG 2 2 2011

No. 10-945

In the Supreme Court of the United States

ALBERT W. FLORENCE, PETITIONER

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 11 OTHER STATES SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a strip search of a detainee upon admission into a jail's general population is constitutional, where the search does not involve physical contact and is conducted to protect the health and safety of the detainee and other inmates.

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INTEREST OF *AMICI CURIAE*

The *amici* states are responsible for the security and health of jail detainees and personnel, and are especially challenged by the escalation of smuggling to meet that responsibility. Police have effectively used strip searches of the same nature as those this Court upheld in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), to detect, remove, and deter dangerous contraband plaguing jails.

The strip search policies complained of in this case apply only to those prisoners being admitted into a jail's general population and apply to all newly-admitted inmates without discrimination. Like their equivalent policies in other states, the Burlington and Essex County policies keep out contraband, i.e., weapons and drugs, and provide effective health screening of inmates essential to identifying infectious diseases and other concealed risks to the general population's health.

These policies also avoid equal protection difficulties that would arise if jail personnel were required to establish reasonable cause to strip search a detainee entering the general population. If this Court imposes an individualized suspicion standard, the *amici* states will be deprived of an indispensable means to administer jail facilities, incapable of guaranteeing that concealed health risks would be identified for the benefit of jail general populations.

Accordingly, the *amici* states respectfully request that the Court uphold the right of jail officials to strip search a detainee upon admission into a jail's general population.

CLARIFICATION OF THE QUESTION PRESENTED

The question actually presented in this case differs significantly from the question Petitioner has framed. The district court analyzed the question "whether the search procedure of non-indictable offenders is unreasonable when it is performed pursuant to a blanket policy without reasonable suspicion." *Florence* v. *Bd. of Chosen Freeholders of the County of Burlington*, 595 F. Supp. 2d 492, 504 (D.N.J. 2009). The court then certified the following question for Third Circuit review: "whether a blanket policy of strip searching all non-indictable arrestees *admitted to a jail facility* without first articulating reasonable suspicion violates the Fourth Amendment . . . ." *Florence* v. *Bd. of Chosen Freeholders of the County of Burlington*, 657 F. Supp. 2d 504, 511 (D.N.J. 2009) (emphasis added). Accordingly, the court of appeals addressed the question "whether it is constitutional for jails to strip search arrestees *upon their admission to the general population*." *Florence* v. *Bd. of Chosen Freeholders of the County of Burlington*, 621 F. 3d 296, 298 (3rd Cir. 2010) (emphasis added). No court in this proceeding has answered the question "whether the Fourth Amendment permits a jail to conduct a suspicionless strip search *of every individual arrested* for any minor offense *no matter what the circumstances*." Pet. Br. i (emphasis added).

Accordingly, the question the *amici* states address is limited to those detainees admitted into a jail's general population. To expand the question to include all arrestees, as Petitioner has done, is inconsistent with the facts of this case, and it necessarily includes many persons not affected by strip-search policies.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the course of a year, more than 13.5 million individuals spend time in jail or prison in the United States. Society can legitimately deprive these individuals of their liberty, but it should not deprive them of their health and safety, or that of the 750,000 men and women who staff incarceration facilities.

Burlington and Essex Counties, like many jurisdictions, have adopted a blanket search policy for all detainees upon their admission to a detention facility. The search does not involve physical contact, and the search is essential to detect weapons and drugs as well as other contraband and to ensure the health of not only the jail's general population and jail officials, but of the detainee himself. Petitioner also alleges that he was subjected to a strip search and a visual body-cavity search under Essex's former written policies, see Pet. App. 140a-142a, but any searches conducted under that policy were constitutional.

For two basic reasons, the Counties' policies do not violate the Fourth Amendment.

First, detainees have no expectation of privacy in jail. Accordingly, strip searches of those admitted to a jail's general population do not implicate the Fourth Amendment.

Second, a uniform strip-search policy for detainees entering a general jail population is reasonable under the Fourth Amendment. Such a search is analogous to a search incident to arrest and is similarly reasonable because it protects detainees and detention personnel.

The Burlington and Essex County policies are consistent with the Court's ruling in *Bell* v. *Wolfish*, 441 U.S. 520 (1979). In *Bell*, this Court upheld a policy of uniform prisoner strip searches after contact visits. The same interests are at stake when a detainee enters a jail's population. To the extent a detainee has an expectation of privacy, compelling governmental health and safety interests outweigh the intrusion. The safety of everyone in the jail would be compromised in the absence of these policies. The imposition of a reasonable-suspicion requirement would also threaten detainee equal-protection rights.

The *amici* states respectfully request that the Court affirm the judgment of the court of appeals.

ARGUMENT

I. Strip searches of those admitted to jail general populations are not searches implicating the Fourth Amendment because an admitted detainee has no expectation of privacy in jail.

This Court has consistently recognized that detention-facility inmates do not have an expectation of privacy in the facility. Accordingly, no Fourth Amendment rights are implicated when jail officials strip search a detainee when admitted into a jail's general population.[1]

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[1] Consistent with the position of the Essex County departments, Essx Br. 1 n.1, this brief uses the phrase "strip search" to include both strip searches as well as visual body cavity searches as described by this Court in *Bell*. *Id.* at 558.

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court determined that a search implicating the Fourth Amendment requires an intrusion on expected privacy. *Id.* at 353. Anticipating Petitioner's argument, the Court explained that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' . . . [T]he protection of a person's general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States." *Id.* at 350–51 (emphasis and footnotes omitted). Justice Harlan summarized the Court's test as follows: a search intruding on reasonably expected privacy can only be unreasonable in violation of the Fourth Amendment if (1) a person has an "actual," "subjective," and "reasonable expectation of privacy" in the thing searched, and (2) contemporary society judges the subjective expectation to be objectively reasonable. *Id.* at 360–61 (Harlan, J., concurring); accord, e.g., *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). In a later case, *United States* v. *Knotts*, 460 U.S. 276 (1983), this Court explained that a privacy interest implicating the Fourth Amendment arises only if a person has a "justifiable," "reasonable," or "legitimate" expectation of privacy, i.e., one that is not merely self-perceived but that "society is prepared to recognize as 'reasonable.'" *Id.* at 280–81.

In *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), the Court affirmed that the nature of a setting and the relationship between the person and the government may abate the reasonableness of the expectation of privacy. *Id.* at 654. It has previously emphasized that "to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or

seizure of his person, his papers, or his effects, is at best a novel argument." *Lanza* v. *N.Y.*, 370 U.S. 139, 143 (1962). The nature of incarceration necessarily reduces the reasonableness of the individual's expectation of privacy in that particular setting. *Hudson* v. *Palmer*, 468 U.S. 517, 527 (1984); see *Bell* v. *Wolfish*, 441 U.S. 520, 559–60 (1979).

Moreover, while the Fourth Amendment does protect privacy interests, it does not protect one's interest in concealing evidence of crime or contraband. *Hudson* v. *Mich.*, 547 U.S. 586, 594 (2006). Because an inmate has no expectation of privacy in a jail, Petitioner is essentially arguing for the right of pre-trial detainees *to conceal* anything, including weapons and health hazards, from detention personnel.

There is nothing special about this case that would suggest a different result here. The *sine qua non* of a search implicating the Fourth Amendment is the intrusion into a reasonable expectation of privacy. The strip search of a detainee admitted to a jail's general population is not a Fourth Amendment search according to this Court's jurisprudence, because there is no reasonable expectation of privacy in a jail or prison. Rather, one is expected to endure the embarrassment of exposing his full body to police and jail officials when the circumstances and security needs of the facility require it. American society has long been aware of and appreciated the reasons for this loss of privacy. Prison searches conducted to detect contraband and ensure detainee and inmate safety do not violate any reasonable expectation of privacy.

II. A policy of uniformly strip searching pre-trial detainees is also reasonable under the Fourth Amendment.

In addition, a policy of uniform strip searches when a detainee is admitted into a jail's general population is reasonable under the Fourth Amendment.

A. Strip searches are analogous to searches incidental to arrest and are similarly reasonable because they protect detainees and detention personnel.

Under the Burlington and Essex County policies, strip searches are incidental to detention and arrest, and as all searches incidental to arrest are reasonable, a uniform strip search policy does not violate the Fourth Amendment.

A strip search upon admission to a prison's general population is similar to a search incidental to arrest. Their purposes are nearly identical—to ensure safety. This Court has acknowledged the similarity of searches at the time and place of arrest to searches upon admission to a detention facility, calling transportation to a police station "a continuation of the custody inherent in the arrest status" and the "factors" justifying a pre-detention search "somewhat different from," but "in some circumstances . . . even greater than," those of a search immediately upon arrest. *Ill.* v. *Lafayette*, 462 U.S. 640, 645 (1983). "For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him . . . ." *Id.*

In *United States* v. *Robinson*, 414 U.S. 218 (1973), this Court sustained the reasonableness under the Fourth Amendment of searches incidental to arrest because the protection of law enforcement officials and discovery of evidence of crime—even crime for which the arrestee was not arrested—were sufficient justifications for such a search. *Id.* at 226 (quoting *Chimel* v. *Cal.*, 395 U.S. 752, 762–63 (1969)). Moreover:

> [i]t is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

Robinson, 414 U.S. at 235.

This Court in *Robinson* emphasized "the traditional and unqualified authority of the arresting officer to search the arrestee's person." *Id.* at 229 (citing *Chimel*, 395 U.S. at 763). The search of an arrestee's person is reasonable even to the point of "a very full incident search," *Robinson*, 414 U.S. at 229 (quoting *Sibron* v. *N.Y.*, 392 U.S. 40, 77 (1968) (Harlan, J. concurring)), or "a relatively extensive exploration of the person," *Terry* v. *Ohio*, 392 U.S. 1, 25 (1968) (quoted in *Robinson*, 414 U.S. at 227). Incidental searches do not require the arresting officer to judge the particular danger posed by or have individual suspicion of the arrestee to conduct a full search. The officer must make "a quick *ad hoc* judgment" as to the prudence of searching the arrestee, given the objectives of ensuring his and the arrestee's safety and the discovery of evidence of crime. *Robinson*, 414 U.S. at

235. This judgment has valid "authority" as "a reasonable intrusion under the Fourth Amendment" and therefore is not subject to judicial review. *Id.*

Robinson did not declare that "*any* search" of an arrestee upon arrest was categorically reasonable, but rather only searches for weapons, contraband, and evidence of crime. *Mary Beth G.* v. *Chi.*, 723 F.2d 1263, 1269 (1983). These types of searches are indistinguishable from the Burlington and Essex County policies, which seek to identify contraband and health hazards to the detainee and the prison's general population. Under *Robinson*, these policies do not violate the Fourth Amendment.

Significantly, this Court has also held that searches which could be lawfully conducted at the time and place of arrest may also be conducted at a later time, including when the arrestee arrives at the detention facility. *United States* v. *Edwards*, 415 U.S. 800, 803 (1974) (citing *Abel* v. *United States*, 362 U.S. 217 (1960) (search after placing arrestee in a cell was permitted at least in part because the "administrative mechanics of arrest" had not been completed)). *Edwards* indicates that law enforcement has some discretion as to the timing of searches incident to arrest, which may be delayed for sufficient reason. In that case, the arrestee's clothes were suspected of being evidence of a crime. Because the jail did not have replacement clothes for him to wear, it seized and searched his clothes the morning after his detention so he would not be left naked overnight. *Edwards*, 415 U.S. at 805. Such a "reasonable delay" did not change the nature or reasonableness of the search as one incidental to arrest, for "Edwards was no more imposed

upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Id.* As noted above, a strip search upon admission to a jail's general population shares the purposes of a search incident to arrest, and the delay of a strip search until arrival at a detention facility is reasonable.

The search that occurs before the entry into a jail facility, of course, is more probing than the one that occurs incident to arrest. But the level of intrusion in each is reasonably necessary based on the circumstances of the search to guarantee safety. Cf. *Lafayette*, 462 U.S. at 645 ("the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him"). Each search corresponds to the nature of the danger presented by the detention. For a police officer after an arrest from a crime, the primary concern is one of the officer's safety. See *Robinson*, 414 U.S. at 234-35 (identifying the "danger to an officer" that is posed "in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station"). By comparison, the danger presented by an inmate's entry into the jail is that of an inmate smuggling a weapon, or bringing in an infectious disease into a facility, where that person may be incarcerated for an extended period of time.

The paradigm danger presented by an inmate being introduced into a residential detention facility is that of hiding a weapon. See *Bull* v. *City and County of San Francisco*, 595 F.3d 964, 967 (9th Cir. 2010) (en banc) ("The record contains reports of the death of an inmate housed in the general population from drugs

obtained within the prison, and of one detainee who set her clothes on fire with a lighter smuggled into the cell, of another who mutilated himself with staples similarly secreted into the jail, and of a third who attempted suicide with razor-blades smuggled into the jail in his rectal cavity."). This danger is substantial not just for jail employees, but also for inmates. See *Petrusak* v. *State,* 39 Ill.Ct.Cl. 113; 1987 WL 960490, *5 (Ill.Ct.Cl. 1987)(providing relief in a tort action against the State for its negligence in performing an "incomplete" search—an inmate was stabbed when "the lower abdomen and groin area where [the perpetrator] claimed to have secreted the knife was not searched"). The more probing search is reasonable in light of the ability of the inmate being processed into a detention facility to plan to secret hidden devices.

In sum, the search of an arrestee in the process of becoming a detainee is analogous to a search at the scene of arrest, and neither implicates the warrant preference of the Fourth Amendment. The paramount objectives, ensuring health and security, justify strip searches of pre-trial detainees upon admission to detention facilities as reasonable.

B. *Bell* v. *Wolfish* previously held that the governmental interest in maintaining the security of a jail justifies a uniform strip search policy of all detainees without individual suspicion as reasonable under the Fourth Amendment.

1. The reasonableness of a uniform strip search policy requires a case-specific balancing of detention-facility and detainee interests, and a recognition of special needs that renders individual suspicion prohibitively impractical.

A uniform strip search policy for detainees upon admission to jails and other detention facilities is inherently reasonable under the Fourth Amendment. The petitioner in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), similarly claimed that a policy of uniform prisoner strip searches after contact visits, instituted to detect and deter weapons and other contraband in the prison, violated the Fourth Amendment. This Court answered the question the Petitioner again poses to it in this case: "whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can." *Bell*, 441 U.S. at 560.

More specifically, *Bell* and other precedents support the conclusion that the strip search policies challenged here do not require individual suspicion to be reasonable. The test for Fourth Amendment

reasonableness requires a balancing of the authorities' need for a search against the invasion of personal rights the search entails. That balancing requires courts to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559; accord, e.g., *Camara* v. *Mun. Court*, 387 U.S. 523, 536–37 (1967).

When balancing governmental and detainee interests, it must be noted that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948) (quoted in *Bell*, 441 U.S. at 546–47); *accord Jones* v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). "This principle applies equally to pretrial detainees and convicted prisoners." *Bell*, 441 U.S. at 547. Thus, an inmate's privacy expectation must "always yield to what must be considered the paramount interest in institutional security." *Hudson* v. *Palmer*, 468 U.S. 517, 528 (1984); see *Bell*, 441 U.S. at 558–60. The government interest in detention-facility health and security need not be a heightened "compelling interest," but only an interest for which a strip search is a proportionate intrusion upon a genuine expectation of privacy. *Acton*, 515 U.S. at 660–61 (1995). A petitioner has a "heavy burden" of demonstrating that policies aimed at meeting "genuine security considerations" are unreasonable. *Bell*, 441 U.S. at 561–62.

Because reasonableness under the Fourth Amendment is determined by a balancing test, "neither

a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness . . . ." *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665–66 (1989); accord *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976) (citing cases), *N.J.* v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985), and *Samson* v. *Cal.*, 547 U.S. 843, 855, n.4 (2006). The impracticality of requiring individualized suspicion supports the reasonableness of suspicionless searches. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 631 (1989).

Accordingly, this Court has declined to require the government to show individual suspicion to search a person when prohibitively impractical, *Von Raab*, 489 U.S. at 674, especially when "the Government seeks to *prevent* the development of hazardous conditions." *Id.* at 668; accord *Camara* v. *Mun. Court*, 387 U.S. 523, 537 (1967). And this Court has acknowledged prison security is a special need. *Skinner*, 489 U.S. at 619–20. Consistent with *Bell*, this special need applies to all detention facilities, such as jails.

2. The governmental interests here outweigh any intrusion upon the privacy expected by a detainee.

In *Bell*, the Court upheld strip searches without distinction as to pre-trial or convicted detainees returning to the facility general population after contact visits. 441 U.S. at 524. *Bell* did not require probable cause to strip search a detainee. *Id.* at 560; see also *Vernonia*, 515 U.S. at 664, n.3.

Applying the four considerations of the *Bell* balancing test, a detainee has no expectation of privacy in conflict with the interest in the general population's health and security. Even if he did, a uniform strip search policy is proportionate to the governmental interest furthered. Consequently, the following factors are relevant if this Court finds a privacy expectation.

First, the scope of a strip search can be very intrusive if it involves a manual body cavity search involving physical contact. But such searches do not take place here.

Second, under the Burlington and Essex County policies, the intrusion is only visual. Moreover, jail officials conduct the search only in the presence of those of the same sex, unless this is impossible.

Third, the state interests justifying the Burlington and Essex County policies are indispensable for a detention facility to function. The health and security of all detainees and facility personnel are jeopardized by the failure to detect weapons and drugs as well as disease and infection, entering the facility. There is no other way to ensure that inmates do not smuggle in weapons into the facility. In the absence of a strip search, everyone—jail employees and inmates—are placed in jeopardy of a criminal assault. See *Petrusak, supra.* Moreover, strip searches are necessary to identifying infectious conditions. That is why the Tenth Circuit has validated facility health and sanitation as reasons for strip searches. *Dunn* v. *White*, 880 F.2d 1188, 1195 (10th Cir. 1989). As this Court recognized in *Illinois* v. *Lafayette*, 462 U.S. 640 (1983), inmates will use their own possessions to injure themselves in detention, justifying the "administrative procedure" of

searching those possessions. *Id.* at 646. Moreover, the Burlington and Essex County policies deter weapons and drugs and other contraband from entering the facility. *Bell*, 441 U.S. at 559. The policy is reasonable so long as the contraband threat in detention facilities remains serious, which it undeniably is.[2]

Fourth, the search is conducted in a private area, away from unnecessary observers. Even under the *Bell* analysis, then, the Burlington and Essex County policies in question are reasonable under the Fourth Amendment.

3. Requiring individual suspicion for strip searches of pre-trial detainees is not required by the Fourth Amendment and would be unworkable because it defeats the deterrent effect the searches are in part calculated to provide and endangers detainees' right to equal protection.

Subjecting the strip search policies of Burlington and Essex Counties to an individual suspicion would be improper. This Court has explained that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary

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[2] In *Bell* v. *Wolfish*, the Court relied not on evidence of smuggling after contact visits but the rationale involved. The *amici* states can demonstrate the presence of contraband and validly argue that a universal strip search policy detects and deters contraband entering jails. Such a policy is effective. See Essex Br. 11, 30-36, 38-39, 45-47.

judgment in the field be converted into an occasion for constitutional review." *Atwater* v. *Lago Vista*, 532 U.S. 318, 347 (2001). This balance must be (1) "workable for application by rank-and-file, trained police officers;" (2) reasonable; and (3) "objective, not dependent on the belief of individual police officers." *Ill.* v. *Andreas*, 463 U.S. 765, 772–73 (1983). Because a scheme of individual suspicion for detainee strip searches would mandate that detention facility personnel abandon an objective judgment that all detainees may be conveying hidden contraband or health hazards, and instead make a subjective, standardless judgment as to the probability that individual detainees pose such threats, it is unreasonable to compromise the important governmental interest for the alleged privacy interest.

Further, requiring government searchers to become familiar with and implement individual suspicion can frustrate the very execution of their duties and "divert valuable agency resources from the[ir] . . . primary mission." *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 666 (1989). Such a requirement would even "sacrific[e]" the purpose for which they conduct strip searches of detainees upon admission to jail general populations, see *O'Connor* v. *Ortega*, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting), by defeating the deterrence such a policy provides for the introduction of weapons and drugs into the facility. As a matter of common sense, an inmate is less likely to attempt to smuggle in a weapon or drugs if that inmate knows that he will be subject to a strip search.

Equally important, if detention personnel were required to identify which detainees were "likely" to be

gang members, or to carry health hazards, such subjective judgments might raise serious concerns under the Equal Protection Clause of the Fourteenth Amendment. See *Bull*, 595 F.3d at 983–88 (concurring opinion) (discussing at length the problems, including Equal Protection concerns, with exempting certain persons or categories of persons from a uniform search scheme). "[P]rison inmates convicted of genteel crimes" and other "sub-class[es]" could not logically be exempted from a search policy imposed upon a class of which they are appropriately members. *Id.* at 984. Detention personnel would end up playing a kind of guessing game which would endanger detainees' equal-protection rights and expose detention-facility officials to liability for violation of constitutional rights. And the threat of such litigation, standing alone, would force many facilities to jettison jail-admission searches altogether, endangering the facility's officials, its other inmates, and the detainee himself. To require individual suspicion in this context is unreasonable.

C. The presumption of an arrestee's innocence does not diminish the reasonableness of strip searching him under the Fourth Amendment.

The Petitioner's suggestion—that the strip search of an arrestee is punishment which is unreasonable under the Fourth Amendment by negating his presumption of innocence, Pet. Br. 19—ignores this Court's pronouncement on the question in *Bell*.

To begin, detention does not imply guilt. A person is detained in a jail pending trial because it is believed there is no other way to guarantee his presence at

trial. The presumption of innocence, therefore, "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell*, 441 U.S. at 533.

More important, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' . . . . Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. . . . [This] does not convert the conditions or restrictions of detention into 'punishment.'" *Bell*, 441 U.S. at 536–37. This Court has recognized the "legitimate interests" in operating a detention facility, which:

> [M]ay require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to . . . make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment.

Id. at 540 (footnote omitted).

This Court in *Bell* held that the policy litigated there was not punitive and did not violate due process rights. 441 U.S. at 560–61. By uniformly strip searching all pre-trial and post-trial detainees upon admission into a detention facility, the states similarly do not execute punishment, but only an administrative measure necessitated by the health and safety hazards posed by incoming detainees.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed amicus curiae briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g.*, *Scott v. Harris*, 550 U.S. 372 (2007); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Kyllo v. United States*, 533 U.S. 27 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF THE ARGUMENT

Unlike *Bell v. Wolfish*, 441 U.S. 559 (1979), which involved a strip search policy applicable only to prisoners who engaged in conduct that raised a risk of smuggling, this case involves a policy applied indiscriminately to all arrestees. The mere fact of arrest and detention does not inherently give rise to the type of risk that may justify a strip search. Arrests can and do result from a wide range of minor offenses and non-criminal violations, and they often occur under circumstances in which there is no reasonable basis for suspecting that the arrestee may be attempting to smuggle contraband into a detention facility. Moreover, to the extent either the type of offense or circumstances of arrest do raise such a concern, traditional Fourth Amendment standards will permit necessary searches. Absent such a basis for suspicion, however, the serious personal invasion of a strip search cannot be justified under the Fourth Amendment.

ARGUMENT

Under the ruling below, citizens who are arrested for minor offenses—or even non-criminal violations—and pose no risk of smuggling may constitutionally be subjected to highly invasive strip searches. That holding goes far beyond *Bell*, a case in which the search policy was limited to prisoners who engaged in specific conduct—contact visits with outsiders—that raised a risk of smuggling. Many offenses and violations that may result in arrest inherently raise no reasonable concern of smuggling, and the traditional reasonable suspicion standard is more than adequate to respond to circumstances of

arrest—or other individual circumstances—that do raise such concern.

AN ACROSS-THE-BOARD POLICY OF STRIP-SEARCHING ALL DETAINEES WITHOUT REGARD TO THE BASIS OF ARREST OR OTHER INDIVIDUAL CIRCUMSTANCES VIOLATES THE FOURTH AMENDMENT.

A. Detention May Be For A Minor Offense That, Standing Alone, Does Not Support A Reasonable Suspicion Of Smuggling

The record in this case reflects no basis for believing that all arrestees—without regard to the offense of arrest—can reasonably be suspected of concealing weapons or other contraband at the time of arrest. To the contrary, there is a wide range of relatively minor offenses and violations that can and do result in arrest but provide no basis for such suspicions.

To be sure, there are certain offenses for which courts have found an arrest, standing alone, to create a reasonable suspicion of contraband. *See, e.g.*, *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (strip search following arrest for crime of violence); *Hicks v. Moore*, 422 F.3d 1246, 1252 (11th Cir. 2005) (finding reasonable suspicion based on battery charges); *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007) (finding reasonable suspicion based on possession of narcotics). But in many cases, as here, the nature of an arrest provides no reasonable basis to suspect that the arrestee may be concealing weapons or contraband. *See* Pet. App. 3a (noting that Mr. Florence was arrested on a bench

warrant issued for a "non-indictable variety of civil contempt").

Mr. Florence's arrest and strip search, moreover, cannot be dismissed as an aberration. Individuals have been strip searched after arrests for refusing to sign a summons, *Jones v. Edwards*, 770 F.2d 739, 740-42 (8th Cir. 1985); not paying parking tickets, *Walsh v. Franco*, 849 F.2d 66, 68-70 (2d Cir. 1988); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (per curiam); driving with a suspended license, *Chapman v. Nichols*, 989 F.2d 393, 394-95 (10th Cir. 1993); failing to license a dog, *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 196 (5th Cir. 1988); and failing to pay child support, *Powell v. Barrett*, 541 F.3d 1298, 1300-01 (11th Cir. 2008) (en banc). In each of these cases, the court specifically found that there was no reasonable suspicion of contraband. *See Jones*, 770 F.2d at 740-41; *Walsh*, 849 F.2d at 70; *Giles*, 746 F.2d at 618; *Chapman*, 989 F.2d at 394; *Watt*, 849 F.2d at 199; *Powell*, 541 F.3d at 1300.

Moreover, a wide range of minor violations and offenses can lead to arrest and detention. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing arrests for non-jailable offenses). For example, individuals have been arrested for violating a noise ordinance, *Amaechi v. West*, 237 F.3d 356 (7th Cir. 2001); not wearing a seatbelt, *Atwater*, 532 U.S. 318; not stopping parallel to a stop sign, *Revely v. City of Huntington*, No. 3:07-0648, 2009 WL 1097972 (S.D. W. Va. Apr. 23, 2009); selling tickets next to a sports arena before an event, *Chortek v. City of Milwaukee*, 356 F.3d 740 (4th Cir. 2004); improperly using a car horn, *Lee v. Ferraro*, 284 F.3d

1188, 1192-93 (11th Cir. 2002); littering by ripping up a parking ticket and tossing it on the street, *Sands v. City of New York*, No. CV 04 5275 BMC CLP, 2006 WL 2850613 (E.D.N.Y. Oct. 3, 2006); throwing a lit cigarette on the ground, *Shipp v. Bucher*, No. 8:07-cv-440-T-17TBM, 2009 WL 179668 (M.D. Fla. Jan. 26, 2009); displaying a "Friends of Police" emblem on a car when not a member of the organization, *Bennett v. Booth*, No. Civ. A. 3:04-1322, 2005 WL 2211371 (S.D. W.Va. Sept. 9, 2005); being in a park after hours, *Tanberg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005); unpaid parking tickets, *Thomas v. City of Peoria*, 580 F.3d 633 (7th Cir. 2009); driving "more closely than is reasonable and prudent," *Holloman v. City of Myrtle Beach*, No. 4:04-1868, 2006 WL 4869353, at *5 (D.S.C. June 8, 2006); and distributing handbills without a permit, *Lorenzo v. City of Tampa*, 259 F. App'x 239 (11th Cir. 2007) (per curiam).

Because so many offenses give rise to no reasonable basis to suspect the arrestee of secreting contraband, the mere fact of arrest—without regard to the nature of the offense, or other individual circumstances—provides no justification for subjecting arrestees to strip searches.

B. The Reasonable Suspicion Standard Preserves Authority To Conduct Necessary Searches

The reasonable suspicion demanded by the Fourth Amendment is fully consistent with the needs of prison security. "[The reasonable suspicion] standard is flexible enough to afford the full measure of fourth amendment protection without posing an insuperable barrier to the exercise of all search and seizure powers." *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.

1982); *see also, e.g.*, *Sec. & Law Enforcement Emp., Dist. Council 82 v. Carey*, 737 F.2d 187, 205 (2d Cir. 1984) (same (quoting *Hunter*)); *United States v. Himmelwright*, 551 F.2d 991, 995 (5th Cir. 1977) ("[W]e feel that the 'reasonable suspicion' standard is flexible enough to afford the full measure of protection which the fourth amendment commands"); *Evans v. Stephens*, 407 F.3d 1272, 1297 (11th Cir. 2005) (en banc) (same (quoting *Himmelwright*)); *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001) ("We emphasize that reasonable suspicion is the minimum requirement, and point out that the more personal and invasive the search activities of the authorities become, the more particularized and individualized the articulated supporting information must be.").

Reasonable suspicion may be based on, among other things, "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." *E.g.*, *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008) (internal quotations and citations omitted). In determining whether reasonable suspicion exists, officers are able to "make inferences from and deductions about the cumulative information available" and "to draw on their own experience and specialized training" to analyze factors that "might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted).

In particular, the reasonable suspicion standard accommodates the possibility that in some circumstances even detainees arrested for minor violations or offenses may reasonably be suspected of attempting to smuggle contraband into a facility.

Thus, reasonable suspicion to conduct a strip search has been found following an arrest of juveniles for "loitering and truancy" where, among other things, the arresting officer saw one of the juveniles hand an object to the other as he approached their vehicle and the arrest occurred in an area where drinking and drug activity regularly took place. *Justice v. City of Peachtree*, 961 F.2d 188, 194 (11th Cir. 1992). Likewise, reasonable suspicion to conduct a strip search has been found following an arrest for misdemeanor destruction of property where arrestee had a rolled-up sock concealed in his clothing. *Doe v. Balaam*, 524 F. Supp. 2d 1238, 1243-44 (D. Nev. 2007).

Other cases where reasonable suspicion sufficient to conduct a strip search has been found include: *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045-46 (7th Cir. 1995) (arrest for driving under the influence where the officer believed he saw the arrestee conceal something); *Campbell*, 499 F.3d at 718 (arrest was for narcotics possession, arrestee fit the description of a person just involved in a drug deal, and the arresting officer observed the defendant drop a bag of marijuana); *Cea v. O'Brien*, 161 F. App'x 112, 113 (2d Cir. 2005) (arrest for failing to comply with a court order to surrender handguns based on the nature of the charge and the arrestee's demeanor at the time of arrest).

And myriad facts about an arrestee have been held to support, or negate, a reasonable suspicion of contraband, including: whether the arrestee "is allowed to visit the bathroom unescorted before an arrest," *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (noting that this fact "may well" create

"reasonable suspicion"); whether the arrestee has a "criminal history of narcotics, weapons or shoplifting violations," *Watt*, 849 F.2d at 198; whether an informant's tip indicates the arrestee has contraband, *see Bradley v. Village of Greenwood Lake*, 376 F. Supp. 2d 528, 536 (S.D.N.Y. 2005); whether the arrestee was "cooperative and orderly" at the time of arrest, *Giles*, 746 F.2d at 618; *Watt*, 849 F.2d at 199 ("[arrestee's] cooperativeness, obvious sobriety, and rationality . . . should have been counted in her favor by the police, as well as her polite acquiescence in searches of her purse and exterior person"); and whether the arresting officer bothered to conduct a frisk or pat-down search at the time of the arrest, *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (finding no reasonable suspicion for strip search and noting that the plaintiff "had been at the Detention Center for one and one-half hours without even a pat-down search").[2]

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[2] To assess whether there is reasonable suspicion to conduct a strip search of someone entering the United States, similarly broad factors have been cited as supporting a search, including:

> (1) Excessive nervousness. (2) Unusual conduct. (3) An informant's tip. (4) Computerized information showing pertinent criminal propensities. (5) Loose-fitting or bulky clothing. (6) An itinerary suggestive of wrongdoing. (7) Discovery of incriminating matter during routine searches. (8) Lack of employment or a claim of self-employment. (9) Needle marks or other indications of drug addiction. (10) Information derived from the search or conduct of a traveling companion. (11) Inadequate luggage. (12) Evasive or contradictory answers.

In light of this flexibility built into the reasonable suspicion standard, there is no justification for strip-searching all arrestees without regard to individual circumstances.

1. Hypothetical Opportunities To Smuggle Contraband Do Not Justify Suspicionless Searches

In holding that across-the-board suspicionless strip searches are permissible, the Third Circuit relied on its own conjecture "that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a (describing this situation as "plausible" and thus "disagree[ing] with Plaintiffs' contention that the risk that non-indictable offenders will smuggle contraband is low"). The Ninth and Eleventh Circuits engaged in similar conjecture when upholding suspicionless searches of all arrestees. *See Powell*, 541 F.3d at 1313-14 (rejecting "factual premise" that "everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice" by noting possible exceptions); *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 978 & n.14 (9th Cir. 2010) (en banc) (rejecting suggestion "that arrestees charged with minor offenses 'pose no security threat to the facility'" and criticizing dissent for engaging in such "appellate fact finding," but offering no basis for finding a contrary fact).

(continued...)

United States v. Asbury, 586 F.2d 973, 976-77 (2d Cir. 1978) (internal citations omitted).

But speculation that some circumstances may create an opportunity for non-indictable offenders to smuggle contraband does not justify searching all such offenders. If the circumstances of arrest suggest that possibility, those circumstances may well create a reasonable suspicion that a strip search will reveal contraband. *E.g.*, *Hartline*, 546 F.3d at 100 (reasonable suspicion may be "based on . . . the particular characteristics of the arrestee, and/or the circumstances of the arrest"). Likewise, if "those in a vehicle who are pulled over and arrested []have time to hide items on their person before the officer reaches the car door," as the Eleventh Circuit supposes might happen, that fact may contribute to reasonable suspicion. *E.g.*, *Justice*, 961 F.2d at 194 (finding reasonable suspicion based on officer's belief that arrestee may have hid contraband as the officer approached).

Experience has borne out that suspicionless strip searches at intake are not necessary to address the problem of smuggling in jails and prisons. Until recently, "ten circuit courts of appeals . . . [had held] that an arrestee charged with minor offenses may not be strip searched consistent with the Fourth Amendment unless the prison has reasonable suspicion that the arrestee is concealing a weapon or other contraband," and none had held to the contrary. *See* Pet. App. 2a, 3a-14a & n.4 (discussing state of the law for nearly three decades, from 1979 until 2008). And numerous states allow strip searches of detainees arrested for certain offenses only if there is individualized suspicion as to that detainee. *See, e.g.*, Cal. Penal Code § 4030(f); Colo. Rev. Stat. § 16-3-405(1); Conn. Gen. Stat. 54-33*l*(a); Fla. Stat.

901.211(2); Iowa Code Ann. § 804.30; 725 Ill. Comp. Stat. Ann. 5/103-1(c); Mich. Comp. Laws 764.25a; Mo. Ann. Stat. § 544.193(2); Ohio Rev. Code Ann. § 2933.32(B)(1); Tenn. Code Ann. 40-7-119(b); Va. Code Ann. § 19.2-59.1; Wash. Rev. Code. § 10.79.130. Even as Courts required individualized suspicion for strip searches, however, "major security problems because of dramatic increases in contraband entering the jail . . . did not develop." William C. Collins, National Institute of Corrections, United States Department of Justice, *Jails and the Constitution: An Overview* 28-29 (2d ed. 2007), *available at* http://static.nicic.gov/Library/022570.pdf.

2. Suspicionless Strip Searches Cannot Be Justified As A Means Of Removing Officer Discretion

The Third Circuit also erred when it relied on the possibility that a reasonable suspicion standard "raises equal protection concerns," Pet. App. 17a; *see also Bull*, 595 F.3d at 983 (Kozinski, J., concurring), to support its holding that suspicionless searches are reasonable under the Fourth Amendment.

First, upholding the searches in this case does not remove officer discretion. Respondent's current intake policies include a blanket policy of strip searches in the form of a "visual inspection," but more thorough strip searches are conducted only upon a reasonable suspicion. J.A. 10a-13a, 118a, 167a, 390a (Burlington's policy); 56a, 273a, 315a, 331-32a (Essex's policy). In fact, a holding that prisons *may* conduct strip searches of all arrestees—even in the absence of reasonable suspicion—will

eliminate the principal constitutional constraint on official discretion to conduct strip searches.

Second, this Court has never suggested that the risk of (unconstitutional) discrimination by officers is relevant to whether a search is reasonable under the Fourth Amendment. To the contrary, the Court rejected a similar argument in *Whren v. United States*, 517 U.S. 806, 813 (1996). In *Whren*, the Court considered whether the allegedly pretextual basis for a traffic stop could render the stop unconstitutional even though it was supported by probable cause. The petitioner argued that "the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given." *Id.* at 810. According to *Whren*, this alternative Fourth Amendment test was justified to avoid the danger "that police officers might decide which motorists to stop based on decidedly impermissible factors." *Id.* The Court recognized the risk of discrimination, but rejected the suggestion that the risk of discrimination could change the Fourth Amendment analysis. *Id.* at 811-13.

Moreover, contrary to the Third Circuit's suggestion that reasonable suspicion is an unworkable standard, it is in fact a familiar and easily applied standard. For example, *Terry* stops require "reasonable suspicion that a person may be involved in criminal activity." *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 185 (2004). And police may search an automobile incident to arrest, but only when it is "reasonable to believe evidence relevant to

the crime of arrest might be found in the vehicle." *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009). Both of these police encounters would carry the same "potential for abuse" that the Third Circuit noted. Pet. App. 27a (noting that "potential for abuse . . . is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest"). Likewise, even the probable cause standard has a potential for abuse. *See, e.g.*, *Atwater*, 532 U.S. at 354 (holding that an officer may arrest an individual if he has "probable cause to believe that [the] individual has committed even a very minor criminal offense in his presence"). Although any of these standards could be applied in a discriminatory way, the government's desire to insulate itself from equal protection concerns by removing officer discretion cannot justify abandoning the individualized suspicion requirements demanded by the Fourth Amendment.[3]

C. The Particularly Invasive Nature Of Strip Searches Requires Substantial Justification

In light of these considerations, the generalized interest in preventing smuggling—when unsupported by reasonable suspicion—cannot outweigh the intrusion on personal privacy imposed by strip searches, which are "categorically distinct" from

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[3] Although *Delaware v. Prouse*, 440 U.S. 648 (1979), suggests that officer discretion *untrammeled* by the reasonable suspicion standard raises Fourth Amendment concerns, *id.* at 662, it provides no support for the notion that the reasonable suspicion standard itself gives officers excessive discretion. *See id.* at 663.

other searches, *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633, 2641 (2009).

Accordingly, while the security needs of a prison may be sufficient to support certain minimally-invasive suspicionless searches, *e.g.*, *Neumeyer v. Beard*, 421 F.3d 210, 214 (3d Cir. 2005) (prison policy of randomly searching visitor's vehicles was reasonable), strip searches are particularly invasive and require a different balance. *See Blackburn v. Snow*, 771 F.2d 556, 559-61 (1st Cir. 1985) (finding that a policy "requir[ing] that all men, women and children wishing to visit inmates at the institution submit to a strip search before doing so" violated the Fourth Amendment; rejecting argument that "by strip searching all visitors, without regard to any individualized suspicion, the Sherriff . . . could avoid the perception of unfairness, yet effectively check the flow of contraband into the Jail").

Moreover, although this case weighs the privacy of a detainee against the security demands of a prison, a prison's need to exclude contraband is just as strong whether the person being strip searched is a detainee, visitor, or employee.[4] If the Fourth Amendment provides any protection for personal privacy in prison, whether for detainees, visitors, or employees, then the security needs of a prison cannot

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[4] Indeed, the visitors and staff may pose a *greater* risk of contraband. In federal prisons, the main sources of drugs are visitors, mail, and staff, not prisoner intake. *See* Office of the Inspector Gen., Dep't of Justice, Report No. I-2003-002, Federal Bureau of Prisons' Drug Interdiction Activities (Jan. 2003), http://www.justice.gov/oig/reports/BOP/e0302/results.htm.

justify any and all searches, without regard to invasiveness or individual circumstances.

Reflecting the extreme invasiveness of strip searches—and the need for convincing justification for conducting them, even in the prison setting—the Courts of Appeals uniformly have held that strip searches of visitors or employees may only be conducted on individualized suspicion; a blanket policy of strip searching prison visitors and prison employees is unreasonable under the Fourth Amendment. *E.g.*, *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991) ("We hold that the case law clearly established the contours of the prison visitor's right to be free from a visual body cavity search in the absence of reasonable suspicion that he or she is carrying contraband."); *Cochrane v. Quattrocchi*, 949 F.2d 11, 13 (1st Cir. 1991) (applying reasonable suspicion standard when prison visitors are strip searched); *Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985) (same); *Hunter*, 672 F.2d at 673-74 (same); *Dist. Council 82*, 737 F.2d at 201 (applying reasonable suspicion standard when prison guards are strip searched).

In light of the blanket nature of the search policy at issue here, and the feasibility of satisfying prison security needs without such a blanket policy, the balance struck by the Third Circuit in this case is inconsistent with these decisions.

D. The Third Circuit Erred In Reading *Bell v. Wolfish* As Justifying An Across-The-Board Suspicionless Strip Search Policy

The Third Circuit relied heavily on *Bell* as broadly authorizing suspicionless strip searches without

regard to individual circumstances. This was mistaken. *Bell* required a context-sensitive analysis, involving "a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. 520, 559 (1979). "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

As such, *Bell* was a limited decision that does not support the across-the-board suspicionless search policy at issue here. As an initial matter, *Bell* reviewed an injunction that demanded a "particular demonstration of probable cause," before inmates could be searched after contact visits, *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 148 (S.D.N.Y. 1977), and framed the question presented as "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause." 441 U.S. at 560 (emphasis added). It therefore did not squarely address whether the Fourth Amendment requires reasonable suspicion or how a requirement of reasonable suspicion might be satisfied.

Further, the search policy at issue in *Bell* was not indiscriminately applied to all prisoners. It was an "across-the-board" policy only in that it applied to all prisoners *who engaged in particular conduct*—contact visits with visitors from outside the facility—that raised a risk of contraband-smuggling. It provides no justification for a policy of *indiscriminate* strip searches, applicable to all arrestees, regardless of the nature of the crime, the circumstances of the arrest,

or other individual circumstances. *See* Pet. App. 23a-24a.

While certain types of crimes—or circumstances of arrest—may raise a risk of smuggling comparable to that at issue in *Bell*, that possibility cannot justify an across-the-board strip search policy applicable even in circumstances where that risk is not reasonably present.

CONCLUSION

Because strip searches are particularly invasive, and because the reasonable suspicion standard preserves authority to conduct searches in appropriate circumstances, the security challenges facing detention facilities cannot justify suspicionless strip searches under the Fourth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 10-945

In the Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Police Accountability Project ("NPAP") is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct cases. NPAP has more than four hundred attorney members throughout the United States.

NPAP assists its members in fulfilling the duty this Court recognized in *Hudson v. Michigan*, 547 U.S. 586 (2006) to enforce constitutional rights through damage actions. To ensure that "civil liability is an effective deterrent," *id.* at 598, NPAP often presents the views of victims of civil rights violations through amicus filings in cases raising issues that transcend the interests of the parties before the Court.

This case arises from petitioner's arrest on a warrant issued for failure to pay a fine and presents broad questions about the circumstances under which a jail may conduct a suspicionless strip search of any person in custody on a minor offense. The question decided by the Court of Appeals was whether arrestees could be strip searched upon their admission to the general jail population. NPAP submits this brief to bring before the

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the amicus curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amicus curiae, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief

Court the interests of detainees who are not entering the "general jail population for custodial housing." *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). These include persons arrested on minor charges and held in local police lock-ups pending an initial appearance before a judge, as well as those placed in special county jail holding cells awaiting an initial court appearance. Also included in this group of temporary detainees are persons who are in the process of posting bail, as well as persons awaiting court ordered released. An additional group of temporary detainees are persons whose release has been ordered but are strip searched upon returning to the jail before being released. All of these temporary detainees have an especial interest in avoiding intrusive, embarrassing, and gratuitous strip searches.

STATEMENT

Petitioner was strip searched while being temporarily detained at a county jail awaiting an appearance before a judge, who would adjudicate petitioner's claim that he had been mistakenly arrested for failure to have paid a fine.

On March 3, 2005, petitioner was a passenger in his motor vehicle when it was stopped by a police officer. (Pet.App. 3a.) The officer ran a computer check and learned that on May 5, 2003 an entry had been made in the "CJIS" database about a civil contempt warrant for petitioner, the owner of the vehicle. (Jt.App. 396a.) The officer determined that petitioner was the person sought in the warrant and placed him under arrest. (Pet.App. 51a.)

The warrant had been issued on April 25, 2003 because petitioner had failed to pay a fine. (Jt.App. 80a.)

Petitioner paid the fine in full on April 29, 2003. *Id.* The officer's computer check showed only that the warrant had been issued. (Jt.App. 396a.)

Pursuant to state procedure, the officer who arrested petitioner on the computer warrant should have taken him within 12 hours "before the nearest available committing judge authorized to admit to bail."[2] The officer instead brought petitioner to the Burlington Jail, where he completed a "hold over" form.[3] (Jt. App. 100a.)

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[2] New Jersey Rule of Court 3:3-3(b) provides as follows:

> (b) Territorial Limits. The warrant may be executed and the summons served at any place within this State. An officer arresting a defendant in a county other than the one in which the warrant was issued shall take the defendant, without unnecessary delay, before the nearest available committing judge authorized to admit to bail in accordance with R. 3:26-2, who may admit to bail conditioned on the defendant's appearance before the court issuing the warrant. Nothing in this rule shall affect the provisions of N.J.S. 2A:156-1 to 2A:156-4 (Uniform Act on Intrastate Fresh Pursuit).

New Jersey Rule of Court 3:4-1(b) requires that this appearance occur "no later than 12 hours after arrest" because bail had not been set when the warrant was issued. The rule provides as follows:

> (b) Arrest on Warrant. If bail was not set when an arrest warrant was issued, the person who is arrested on that warrant shall have bail set without unnecessary delay, and no later than 12 hours after arrest

[3] Warden Cole of the Burlington Jail explained at his deposition that a "hold over is an inmate that's put in our facility by a police officer." (Jt.App. 106a.)

The Burlington County Jail accepted petitioner "as a holdover awaiting transportation to Essex County." (Jt.App. 24a.) Petitioner, who was neither formally processed nor admitted to the Burlington Jail, was nonetheless strip searched while being "held over." (Pet.App. 51a-52a.)

Petitioner remained at the Burlington Jail for six days awaiting the seventy mile trip to the Essex County Correctional Facility. (Pet.App. 52a.) Petitioner arrived at the Essex County facility at 11:39 p.m. on March 9, 2005. (Jt.App. 67a.) The Facility's written policy requires that any detainee be "accompanied by a proper commitment document ... which shall include a bail." (Pet.App. 146a.) Although petitioner had not received a bail hearing, the Facility accepted custody of petitioner and subjected him to a strip search in advance of appearing before a judge the next day. (Pet.App. 52a.) On March 10, 2005 at 1:41 p.m., a court clerk made a computer inquiry of the "Comprehensive Automated Probation System" and verified petitioner's claim that he had paid the fine in full. (Jt.App. 80a.) A judge ordered petitioner's release the same day. (Jt.App. 9a.)

Petitioner filed this action under 42 U.S.C. § 1983, alleging *inter alia* that he had been unlawfully strip searched. Petitioner sought to represent a class of "all arrestees charged with non-indictable offenses" who had been processed into the Burlington Jail and into the Essex County Correctional Facility. (Jt.App. 18a.) The district court found that petitioner was not a member of this proposed class because he had not been "formally processed into the Burlington Jail." (Jt. App. 25a n.6.) The district court certified a class using its amended

class definition of all "arrestees who were processed, housed, or held over at Defendants' jails."(Jt.App. 43a.)

The district court concluded on cross-motions for summary judgment that "strip searches of nonindictable offenders performed without reasonable suspicion violates the Fourth Amendment." (Pet.App. 84a.) The Third Circuit reversed on an interlocutory appeal taken pursuant to 28 U.S.C. § 1292(b).

The Third Circuit limited its review to "whether it is constitutional for jails to strip search arrestees upon their admission to the general population." (Pet.App. 1a.) A divided panel of the Court of Appeals answered this question by balancing "the Jails' security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates." Pet.App. 28a.) The panel majority concluded "that the strip search procedures described by the District Court at BCJ and ECCF are reasonable." *Id.* The court held that the same result applied to "people properly assigned to the Jails and entering the general population ... whether they be convicted inmates, indicted pretrial detainees, contemnors, material witnesses, or arrestees awaiting preliminary hearings before a magistrate." (Pet.App. 22a n.7.)

SUMMARY OF ARGUMENT

Petitioner was arrested on a warrant issued because he had failed to pay a fine. The warrant was neither quashed nor recalled after petitioner paid the fine; when petitioner was arrested on the warrant, he was "held over" at two jails before appearing before a judge, who quashed the warrant and ordered petitioner's release.

It is patently unreasonable to strip search a "hold-over" arrested on a warrant for non-payment of a fine, who was not formally processed into the jail, and who should have been brought before a judge for a bond hearing within the next 12 hours under applicable state law.

There are many circumstances in which persons are temporarily detained at a jail without being appropriately processed into the general population. A person may have been arrested without a warrant, and held at a station house or a county jail holding cell pending presentment to a court for the filing of charges, a probable cause determination, or setting bail; or arrested on a warrant, and awaiting a court appearance, to show that the warrant had been erroneously issued, or that he (or she) is not the person sought in the warrant, or awaiting the setting of bond.

The lower federal courts "have consistently recognized a distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards." *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008). The Ninth Circuit acknowledged this distinction in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), when it noted that "[t]he reasonableness of a search is determined by its context," *id.* at 971, and limited its decision to arrestees "introduced into the general jail population for custodial housing." *Id.* The Eleventh Circuit made the same distinction in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), when it limited its decision to persons who "were strip searched solely because they were entering the general population of inmates at the

detention facility." *Id.* at 1300. The Court should likewise acknowledge this important distinction.

Additionally, strip searches are often undertaken *after* people have been ordered released, e.g., when charges are dropped. These gratuitous strip searches take place even when arrestees have not yet been processed into the general population or have been but are now subject to immediate release.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court considered the reasonableness of a policy requiring the strip search of a pre-trial detainee returning from a contact visit. The Court upheld the strip search policy "as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy these visits are intended to afford." *Id.* at 559 n.40. The "alternative" in this case for a person arrested on a warrant for failure to have paid a fine is to comply with state law by promptly taking the person arrested on a warrant to a judge, who can quash the warrant or set bond.

ARGUMENT

I. Strip Searching a Person Arrested on a Warrant Issued for Failure to Pay a Fine Is Unreasonable

Petitioner was arrested on a warrant issued because he had failed to pay a fine. The warrant was neither quashed nor recalled after petitioner paid the fine; when petitioner was arrested on the warrant, he was "held over" at two jails before appearing before a judge, who quashed the warrant and ordered petitioner's release. It was manifestly unreasonable to strip search a person "held over" at a jail on a warrant for non-

payment of a fine, rather than to comply with state law and promptly bring the arrestee before a judge.

The historical record does not provide "a sure indication of the kinds of body searches that Americans thought reasonable in 1789-91."[4] The reasonableness of strip searching a person arrested on a warrant issued for failure to pay a fine, when that person is "held over" and not admitted to general population at a jail awaiting an appearance before a judge, therefore turns on "a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

Any claim that jail security requires the strip search of all persons being "held over" should fail unless supported by the type of empirical evidence on which the Court relied in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990). There, the data showed the effectiveness of sobriety checkpoints. *Id.* at 454-55. Here, the empirical evidence advanced to justify strip searching pre-trial detainees shows the lack of effectiveness of these intrusive searches.

The Seventh Circuit found in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), that there was no evidence to support the claim that contraband would be found on "women minor offenders entering the lockups for short periods while awaiting bail." *Id.* at 1273. Today, after nearly 30 years of advances in body-search technology and deployment of magnetometers, body orifice security scanner ("BOSS") chairs and full-body scanners, it is not surprising that there continues

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[4] William J. Cuddihy, The Fourth Amendment Origins and Original Meaning 769 (2009).

to be no empirical evidence to support strip searching persons arrested on minor charges. The careful analysis undertaken by the district judge in *Dodge v. County of Orange*, 282 F.Supp.2d 41 (S.D.N.Y. 2003), underscores the lack of utility in broad strip search practices.

Dodge involved strip searches at the Orange County Correctional Facility. The district court granted a preliminary injunction to bar enforcement of the jail's strip search policy in July of 2002. *Dodge v. County of Orange*, 209 F.R.D. 65, 79 (S.D.N.Y. 2002). The decree permitted the jail to strip search newly arrived detainees charged with misdemeanors "only when they had reason to believe the new arrival might be secreting contraband, based on (1) the nature of the crime charged; (2) the circumstances of the arrest; and (3) the particular characteristics of the arrestee." *Dodge*, 282 F.Supp.2d at 43.

The district court evaluated the impact of the injunction when it considered a request to bar strip searches of new arrivals who were charged with felonies. 282 F.Supp.2d at 43. The court found that of the 23,000 persons admitted from January of 1999 to February 28, 2003, "the County encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search." *Id.* at 69. The court also found that "there may have been reasonable suspicion to strip search four of these five detainees, based upon either the nature of the offense or the characteristics of the detainee. *Id.* at 70.

The district court in *Dodge* concluded that "the data belies [defendants'] contention [that more contraband has been smuggled into the facility as a result of the

preliminary injunction]." *Id.* at 87. *Dodge* makes plain that respondents cannot support their policy with empirical data.

Similar data was presented in *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001). There, records produced by the Nassau County Jail showed that contraband had been found in only 16 of the 75,000 strip searches of new admittees conducted over a five year period, and that nearly all of these 16 pieces of contraband would have been detected in a pat-down or a search of shoes and outer-clothing. Moreover, in the three instances in which contraband was found beneath the undergarments, there was reasonable suspicion to justify a strip search.[5]

More recently, in a case involving a very large jail in Cook County, Illinois, the district court found that the jail officials were unable to show that persons entering the jail on minor charges "routinely possessed contraband." *Young v. County of Cook*, 616 F.Supp.2d 834, 847 (N.D.Ill. 2009).

Cases arising from strip searches of persons in custody on minor offenses consistently demonstrate the unreasonableness of these intrusiveness searches. It is

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[5] *Shain v. Ellison*, 2d Cir., No. 00-7071, Appendix A343-493; Supplemental Appendix SA7-43. Only three strip searches yielded weapons or contraband from the detainee's body or a body cavity. *Shain*, Appendix A354-72, A391-97, A398-413. Contraband found in the other 13 strip searches was located in the shoes or clothing of the detainee, and would have been found by a "pat down" or "clothing" search only. In the three cases in which the contraband was found on the body or in a body cavity, there was a drug or felony history that would have justified a strip search on individualized reasonable suspicion. *Shain*, supra, Appendix A343-493.

impossible to defend as reasonable the strip search of a young woman arrested for being underage in a tavern. *Doe v. Calumet City*, 754 F.Supp. 1211, 1213-14 (N.D.Ill. 1990). It is equally difficult to explain the need to strip search a woman "arrested for violating a municipal ordinance that prohibits peddling sausages without a license." *Ford v. Suffolk County*, 154 F.Supp.2d 131, 136 (D.Mass. 2001).

A plausible showing of reasonableness cannot be made to justify the strip search of a women "detained for the nonpayment of parking fines in the amount of $75." *Roderique v. Kovac*, 1987 WL 17058 *4 (D.N.J. 1987). The same is true for the strip search of a woman who failed to appear in traffic court because the judge had given her the wrong appearance date. *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989). Or the strip search of a man arrested on a withdrawn warrant for failure to pay a traffic fine. *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984).

The decision of the Third Circuit, if allowed to stand, would authorize each of these unreasonable searches, as well as the strip search of Mrs. Atwater following her arrest for a seat belt violation. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The Court should reject this dilution of the Fourth Amendment and reverse.

II. The Court Should Recognize the Differences between Temporary Detainees and Those Properly Assigned to the General Jail Population

There are many circumstances in which persons are temporarily detained at a jail and not processed into the general population. For example, many jails, like those in Orange and Nassau County, New York, do not admit new jail entrants to general population for 72 hours or more for medical screening or other reasons.[6] Thus, without exception, the lower federal courts recognize a "distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards."[7] *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008). There is no legitimate reason to strip search a person who is about to be released.

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[6] *Dodge v. Orange County*, 282 F. Supp. 2d 41, 54 (S.D.N.Y. 2003) (usually three to five days but up to seven days before admission to general population); *Shain v. Ellison*, 2d Cir., No. 00-7071 , Appendix A317-19, A339 (pursuant to the Jail's health quarantine policy, new admittees to the Jail are not released into the general Jail population for 72 hours).

[7] The Ninth Circuit recognized this distinction in *Bull v. City and County of San Francisco*, 595 F.2d 964 (9th Cir. 2010) (en banc), when it noted that "[t]he reasonableness of a search is determined by its context," *id.* at 971, and limited its decision to arrestees "introduced into the general jail population for custodial housing." *Id.* The Eleventh Circuit acknowledged the same distinction in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), when it made plain that its decision was limited to persons who "were strip searched solely because they were entering the general population of inmates at the detention facility." *Id.* at 1300.

Most persons arrested on warrants for failure to have a paid a fine are released at or before their initial court appearance. The arrestee may post bond. *Roderique v. Kovac*, 1987 WL 17058 *4 (D.N.J. 1987). The judge may determine, as in this case, that the fine had been paid. Or, as in *Patton v. Przybylski*, 822 F.2d 697, 698 (7th Cir. 1987), the judge may find that the arrestee is not the person sought in the warrant. Alternatively, the judge may find that the detention "was in error," as in *Calvin v. Sheriff of Will County*, 2004 WL 1125922, *1 (N.D.Ill. 2004), *opinion granting summary judgment*, 405 F.Supp.2d 933 (N.D.Ill. 2005). These temporary detainees should not have to undergo the indignity of a strip search.

Nor should persons be strip searched after appearing in court and securing an order of release, as in *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001). "[T]here is no necessity whatever to strip search a person who was wholly innocent of any charge." Id. at 736. There is also no need to strip search a person about to be released on bond. *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981). Nor is there any basis to strip search a person who is about to be released because charges have been dismissed or because he (or she) has been sentenced to time considered served, *Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1131 (E.D. Cal. 2009). The district court in *Gary v. Sheahan*, 1999 WL 1021040 (N.D.Ill. 1999) recognized this rule when it prohibited "strip searching female inmate court returnees who have been judicially discharged." 1999 WL 1021040 at *3.

Many strip search policies appear to be based on the type of over-inclusive rationale the Court rejected in *Bell v. Wolfish*, 441 U.S. 520 (1979) when it evaluated

"loading a detainee with chains and shackles and throwing him in a dungeon ... [to] ensure his presence at trial and preserve the security of the institution." *Id.* at 539 n.20. For example, one of the subclasses in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) consisted of persons who had posted bond or had been ordered released at their initial appearance. These persons had not been strip searched after arrest or before appearing in court but each member of this subclass was strip searched while awaiting release. The jail sought to justify strip searches because it held these former detainees in custody while searching for "other detention orders, warrants, and holds." *Powell v. Barrett*, 496 F.3d 1288, 1313 (11th Cir. 2007) (panel opinion).

The Court should not approve the strip search of persons entitled to release merely because a jail is hoping that something will turn up in its search for "detention orders, warrants, and holds." This is precisely the type of investigative detention the Court condemned in *Davis v. Mississippi*, 394 U.S. 721 (1969), and is fairly described as the "hallmark of a police state." *United States v. Montoya de Hernandez*, 473 U.S. 531, 550 (1985) (Stewart, J., dissenting).

The Court should reject any argument that it is not practical to make distinctions between temporary detainees and those properly assigned to a jail's general population. The Constitution recognizes higher values than "speed and efficiency," *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), and "[w]ith the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring).

CONCLUSION

It is therefore respectfully submitted that the Court should reverse the judgment of the court of appeals.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ALBERT W. FLORENCE, PETITIONER

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL SHERIFFS' ASSOCIATION, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENTS

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL., IN SUPPORT OF THE RESPONDENTS

The National Sheriffs' Association, et al., respectfully submit this *amici curiae* brief in support of Respondents Board of Chosen Freeholders of County of Burlington, et al. (collectively, the "Respondents"). Pursuant to Supreme Court Rule 37.2(a), counsel of record have received timely notice of the intent to file this brief.

INTEREST OF *AMICI CURIAE*[1]

The National Sheriffs' Association (the "NSA") is a non-profit association organized under § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the amici curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties' consent to the filing of this brief was entered on April 13, 2011.

Amici represents the nation's sheriffs, who operate more than 3,000 local detention facilities throughout the country. The vast majority of these facilities house both convicted felons waiting to be transferred to other facilities as well as pretrial detainees awaiting court appearances. In addition, the majority of these facilities also handle individuals arrested on minor offenses being held only temporarily while they arrange to post bail or otherwise arrange their release.

Sheriffs, as the custodians of the inmates housed within these facilities, are charged with providing a safe and secure environment for both the inmates and for their employees. *Amici* and all other associations joining in the attached brief assert that the decision of the lower court is vital to their ability to provide their states, counties, regions or municipalities with safe and secure detention facilities.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Third Circuit to conclusively establish that a detention facility's adoption of a blanket policy requiring that all detainees be strip searched prior to being admitted to the general population of the facility is not a violation of such detainee's constitutional rights. Two very compelling reasons necessitate an affirmation of the circuit's ruling.

First, as this Court held in *Bell v. Wolfish*, detention centers are "unique place[s] fraught with serious security dangers." 441 U.S. 520, 559 (1979). These dangers can be categorized into three areas: 1)

the smuggling of contraband into detention facilities which threatens the safety of inmates, employees and visitors; 2) the identification of gang, racial or organized crime affiliations through distinguishing body markings, and 3) the detection of serious medical or health problems and the ability to prevent the spread of disease or epidemic. Any failure to prevent and eliminate such dangers could result in severe injury and harm to inmates, employees, visitors or, in the case of escape, members of the general public. As such, hindering or compromising law enforcement's ability to deter, prevent or eliminate these dangers should be exercised with extreme caution and only in instances of clear constitutional violations. Internal safety in detention centers always outweighs the invasion of the personal privacy rights of a particular detainee. Otherwise, a detainee could keep his personal privacy rights but, ultimately, lose his life or limbs at the cost of maintaining these rights.

Furthermore, detention in a correctional facility "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). "Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility." *Bell*, 441 U.S. at 537. The loss of personal privacy rights during a strip search is outweighed by the objective for which it serves - internal security and safety for both detainees and employees.

Secondly, as this Court noted in *Block v. Rutherford*, the judiciary should play "a very limited role...in the administration of detention facilities." 468 U.S. 576, 584 (1984). "There is no difference between courts running school systems or prisons and courts

running Executive Branch agencies." *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995). "Separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

Based on the federalism concerns previously articulated by this Court, the institution of a blanket policy allowing detainees to be strip searched prior to their admission into the general population of a detention center in an effort to maintain internal safety should be left to the sound discretion of the law enforcement professionals who operate the detention facilities. Courts should give great deference to detention facility operators, directors and administrators who have determined the necessity of such policies. The intrusion of the blanket strip search, similar to that at issue in *Bell*, should be weighed in favor of the detention facility's asserted justification for it. A legitimate security and safety concern must outweigh the invasion of the personal privacy rights of an individual detainee being admitted into the general population of a detention facility. Additionally, the doctrine of federalism further prevents the judiciary from substituting its judgment regarding the safety, health and security concerns facing detention centers for that of those who operate said centers, particularly since, as noted by this Court, "courts are ill-equipped" to deal with the management of detention facilities. *Bell*, 441 U.S. at 559.

A DETENTION FACILITY'S POLICY TO STRIP SEARCH ALL DETAINEES ADMITTED TO THE GENERAL POPULATION OF THE FACILITY DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Over 30 years ago, the Supreme Court reviewed the strip search policy of New York City's Metropolitan Correctional Center ("MCC") in *Bell v. Wolfish*, 441 U.S. 520 (1979), and thereby established the touchstone for all jail strip search policies. In that case, the Court examined a strip search policy strikingly similar to those at issue in the current case. The rationale adopted by the Court in upholding the constitutionality of the MCC's policy is precisely the rationale used to create the policies at issue in the current case.

Shortly after the Court released *Bell*, the Circuits began to interpret the language of the decision narrowly, thereby restricting the use of strip searches. Recently, however, a split has developed as the Circuits have re-examined the rationale for strip searches and gained a greater appreciation for the mounting dangers that jail administrators face in dealing with an ever increasing population. Over the intervening years since the Court released the *Bell* decision, the population of local detention facilities has exploded, and state prisons have become more and more incapable of accepting new inmates. The resulting population increase has caused local detention facilities to adopt policies and procedures to better insure the safety of the inmates and staff and the security of the facilities.

The *Bell* Court, while noting that prisoners do not forfeit all constitutional protections by reason of their confinement, provided that

> simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations...The fact of confinement as well as the legitimate goals and policies of the penal institution limit these retained constitutional rights...This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the range of freedoms of an unincarcerated individual.

Bell, 441 U.S. at 545-6.The Court in *Bell* went on to state that, "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." Id. 559-560 (internal citations omitted). The smuggling of such contraband has long been recognized by the appellate courts as an intractable problem that threatens the health and safety of inmates, corrections officers, and jail employees. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 134 (2003); *Bell, supra*, at 559; *Block v. Rutherford*, 468 U.S. 576, 588-589(1984); *Hudson v. Palmer*, 468 U.S. 517, 527(1984).

In addition to preventing the introduction of contraband into facilities, strip searches provide an opportunity for detention officers to observe tattoos, body piercings, and other distinguishing marks which may assist in indentifying gang affiliations. Such knowledge is critical to the task of appropriately

segregating populations within detention facilities. As Justice Thomas has previously recognized:

> Controlling prison gangs is the central challenge facing correctional officers and administrators. Carlson, Prison interventions: *Evolving Strategies to Control Security Threat Groups*, 5 Corrections Mgmt. Q. 10 (Winter 2001) (hereinafter Carlson). The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder. *Id.*, at 12; *Cal. Dept. of Justice, Division of Law Enforcement, Organized Crime in California Annual Report to the California Legislature 2003*, p. 15, available at *http://caag.state.ca.us/publications/org_crime.pdf*. In fact, street gangs are often just an extension of prison gangs, their "'foot soldiers' " on the outside. *Ibid.*; Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 Am. U. L.Rev. 41, 55-56 (1987). And with gang membership on the rise, the percentage of prisoners affiliated with prison gangs more than doubled in the 1990's. (Footnote omitted).

Johnson v. California, 543 U.S. 499, 532-33(2005).

A further rationale necessitating strip searches is to assist detention officers in detecting medical problems that might pose serious health problems to a confined population. Detention facility administrators are charged with controlling the spread of disease and infection and, as such, must be free to institute policies

and procedures to protect against such epidemics. Obviously, maintaining the health and condition of the detention center's population is a legitimate governmental interest that outweighs the personal privacy rights of individual detainees.

Clearly, each of the reasons set forth supporting the need for strip searches is reasonably related to a legitimate penological interest justifying implementation and continuation of said strip search policy. Based on the long-established holding articulated by this Court in *Bell*, a detention center's policy to strip search its detainees prior to their admittance into the general population of the detention center does not violate any constitutionally protected rights of the detainees.

THE JUDICIARY MUST ACCORD GREAT DEFFERENCE TO DECISIONS MADE BY THE ADMINISTRATORS OF CORRECTIONAL FACILITIES WHICH IMPACT MATTERS OF INSTITUTIONAL SAFETY AND SECURITY.

This Court has counseled the lower courts to refrain from substituting their judgment for that of experienced detention professionals. *See Block, 468* U.S. at 584-85, ("In setting forth these guidelines, we reaffirmed the very limited role that courts should play in the administration of detention facilities. In assessing whether a specific restriction is "reasonably related" to security interests, we said, courts should "heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have

exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.'" (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). (We also cautioned: "[P]rison administrators [are to be] accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (quoting *Bell*, 441 U.S. at 547). *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984).

Respectfully, *Amici* submit that the Circuits which have found against the constitutionality of blanket strip search policies have simply inappropriately substituted their judgment for that of the administrators actually operating the facilities in determining the need for the policies at issue. While a strip search is, admittedly, highly invasive of one's privacy, those privacy concerns must give way to the broader safety and security concerns affecting the rest of the detention center's population. And while *Amici* would concede that very few people want to be strip searched, it is equally true that very few employees want to be tasked with the responsibility of such a search. The search is not done to be demeaning, but, rather, out of necessity and in furtherance of the safety and security of the detention center's population.

The guidance provided by this Court in *Bell* indicates that the need for the search should be balanced against the invasion of personal rights that the search entails. In that balancing, however, due consideration must be given to the legitimate security concerns of the detention center administrator. Courts have long recognized the serious dangers posed by the

smuggling of contraband into detention facilities, as well as the need of corrections officials to monitor the activities of gang members. The Third Circuit appropriately applied the balancing test set forth in *Bell* in weighing those competing interests, and properly found that a blanket strip search policy did not infringe upon the constitutionally protected rights of detainees.

Privacy inside a detention facility is limited. Because the scope of the particular intrusion into the personal privacy rights of a detainee is limited to ascertaining whether any hidden or unknown safety threats exist, it is not overly intrusive. Typically, physical contact is unnecessary. As such, conducting such searches in a manner that involves a group of detainees or a single detainee undressing and/or showering in front of same sex detention officers does not, of itself, constitute a violation of the Fourth Amendment when it is related to security concerns of the detainees and employees within the detention center.

CONCLUSION

The Court should affirm the opinion of the Third Circuit to permit detention facilities to implement blanket policies requiring the strip search of inmates prior to their admittance into the general population of the facility, as said policies further a legitimate safety, health and security interest for the detainees, employees, administrators and visitors to the facility, and, as such, do not violate the Fourth Amendment.

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AMICUS CURIAE BRIEF

No. 10-945

IN THE
Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NEW JERSEY COUNTY JAIL WARDENS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the New Jersey County Jail Wardens Association ("Association") is a membership organization of county jail wardens in New Jersey founded in 1959 to share information regarding the operation of county jails, and to present a united effort to attain objectives defined by the members. The Association submits this brief out of concern that the security of the nation's jails not be compromised by unworkable and ill-conceived constitutional rules governing the search of jail admittees for contraband, and that wardens and their institutions not be subject to unwarranted claims under 42 U.S.C. § 1983 as a result of such rules. The Association is also concerned that constitutionalizing the rule that petitioner seeks would frustrate future efforts to modify restrictive state laws on intake searches that the Association believes are impairing jail security and jeopardizing the safety of inmates and correctional staff alike.

ARGUMENT

Respondents have capably briefed the constitutional law governing this case, and the Association will not replicate that effort. The Association instead devotes this brief to giving the

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel for a party or person other than *amicus curiae*, its members, or counsel for *amicus curiae* made a monetary contribution to fund the preparation or submission of the brief. The parties have filed written letters of global consent to *amici curiae* briefs.

Court a fuller perspective on the operation of county jails; the imperative of preventing contraband of all kinds into jail populations; and the mischief that will ensue from the rule that petitioner proposes.

The fundamental point is this. Jails are institutions that confine often lawless and dangerous persons in close quarters. There is inherent risk to detainees and correctional staff alike from the nature of the institution and the confined population, and that risk is intensified by widespread and growing gang activity in prison. Contraband – which encompasses not just weapons, dangerous implements, and drugs, but also any item that is unauthorized (or held in unauthorized amounts) – has value in the underground economy of jails. The competition in jail for such goods begets violence, extortion, and disorder. Correctional officials must have the authority to stem the flow of contraband into their facilities, for the protection of both inmates and staff. In the experience of New Jersey jail wardens, persons committed on indictable offenses are not significantly more likely than other admittees to secrete contraband on their persons. Minimally intrusive visual inspections of private areas of admittees ("strip searches") upon admission routinely yield concealed contraband. Performance of such searches as standard intake procedure is reasonable in light of institutional safety imperatives and the reduced expectations of privacy in the jail setting. Petitioner's proposed "reasonable suspicion" rule is unworkable, unduly compromises jail safety, and invites strategic behavior from recidivist and street-wise prisoners and criminal gangs that will foster disorder in the nation's jails.

The following statement from one inmate, who was committed on a probation violation for a credit-card offense and not strip-searched on intake, and who later confessed to smuggling contraband, illustrates the problem: "I had it tucked in my bra when I came in. The officer didn't feel it when she patted me down. I knew I wasn't going to get strip searched when I came in, so I wasn't worried about it." Office of the Sheriff, Cape May County, Disciplinary Report #11-082.

This Court should not constitutionalize the unwarranted rule that petitioner advocates, which will hamper the ability of county jails to stem contraband smuggling and control gang activities in jail. Instead, it should affirm the decision below.

A. Jails By Their Nature Create Conditions That Place Correctional Staff And Inmates At Risk Of Violence And Extortion By Other Inmates.

Recent years have witnessed increases in jail populations that have only just begun to taper off. U.S. Dep't of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2010 – Statistical Tables*, Fig. 1 (2011) ("*Jail Inmates Statistical Tables*"), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2375. The populations in county jails vary greatly; in New Jersey, which has 21 county jails, the average daily inmate population in 2010 ranged from 115 in Hunterdon County to 3,032 in Essex County.[2] Jail

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[2] New Jersey jail population-related statistics are accessed by the member wardens from the New Jersey County Correction Information System.

populations are a mix of the sentenced, the unsentenced, and those on other status; over 20% of the population in a number of New Jersey jails consists of sentenced offenders.[3]

Turnover is rapid. Nationally, nearly 13 million persons were admitted to a jail in 2010, which is about 17 times the average daily jail population. *Jail Inmates Statistical Tables*, at 2. The national weekly turnover rate was nearly 65%. *Id.* Table 4. The average length of stay in jail is measured in weeks, but there is a substantial range. For example, in the Ocean County jail, the average stay is 28 days, but some inmates are confined for just a few hours and some for more than 3 years. In the Middlesex County jail, the average stay is 42 days, but some inmates have been confined for 4 years. Overall, in New Jersey in 2010, there were 2,776 weekly admissions and 2,799 weekly discharges in a county jail system with an average statewide daily population of 16,718.

Admissions vary from day to day. For example, at the Atlantic County jail, there were on average 31 daily admissions in 2010, with a peak of 65 in a day. At the Essex County jail, there were 58 per day, with a peak near 120. In Passaic County, the average is

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[3] The unsentenced include those who are being held for a pending municipal court hearing or trial, grand jury proceeding, New Jersey superior court hearing or trial, or drug court proceeding. The sentenced include those serving municipal or superior court sentences, and those whose transfer to state prison is pending. A large number of inmates in county jails may have other status, including parole and probation violators, family or juvenile court holds, fugitives, and U.S. federal marshal detainees.

20, with a peak of 57. A number of factors account for the variation. Commitments are often highest on Fridays (which are the sentencing days at municipal courts in many counties). Admissions rise on weekend nights when assault, DUI, and domestic-violence arrests are common. Admissions may also peak when there are warrant raids or drug sweeps, or when local police agencies transfer two or three days' worth of arrestees held in municipal lock-ups and police-station detention cells after arraignment.

Jail facilities also vary significantly. In most facilities, inmates are confined in multiperson cells (usually 2 or 3 in a cell). Some facilities have four to six beds in dormitory cells, and others have dormitory rooms. The dormitory rooms in the Hudson County and Passaic County jails house 64 and 36 inmates respectively. Many jails are crowded; nine of the 21 New Jersey county jails operated at more than 100% of their rated capacity as of July, 2010. Besides exposure to cellmates, inmates mix with other inmates in common areas during recreational and meal periods.

Many inmates, regardless of the infraction for which they were arrested or the crime for which they were committed, have violent tendencies. The pressures of confinement, especially in crowded conditions, may also foster violence, coercion, and extortion. Inmate-on-inmate violence and inmate-on-staff violence is thus a constant occurrence and risk against which jails must guard.

B. The Activities And Rivalries Of Organized Gangs Increase Violence And Extortion At Jails.

The inherent risks of jail for inmates and staff are exacerbated by the penetration of organized criminal gangs into the jail system. The State of New Jersey Commission of Investigation, in a study of the state prison system, aptly described the problem:

> [B]urgeoning numbers of gang-affiliated inmates today increasingly exploit systemic weaknesses to organize and thrive inside prison walls. They communicate widely with cohorts both inside and outside of prison via cellular phones and other means, and they readily secure, use and deal in contraband, including illegal narcotics. They carry out illicit financial transactions and launder money through an official system of inmate accounts. They extort fellow inmates and their families. They corrupt corrections personnel, including custody officers and civilian staff. Together, these circumstances enable them to nurture and advance violent criminal enterprises while incarcerated, and their ability to operate in this fashion raises the specter of greater violence, not just inside the prisons, but once they return to the outside world.

N.J. Comm'n of Investigation, *Gangland Behind Bars*, at 1-2 (May 2009) (available at http://www.state.nj.us/sci/pdf/Gangs%20SCI%20

Report%20Full.pdf). Gangs, despite popular perceptions of them as a youth phenomenon, are sophisticated and "highly structured" organizations "led by adults and resembling traditional criminal syndicates." *Id.* at 9. Gang membership has been rising quickly across the country, and in correctional institutions. More than 20% of inmates at New Jersey prisons are gang members, and gang-member inmates enter the prison system at a rate of 75-80 per month. *Id.* at 11.

The same problems with gangs that have arisen in the state prison system plague county jails. For example, Bergen County has identified 90 gang members in it facilities; Monmouth County has 96 confirmed or suspected gang members out of a population of 1158. The actual numbers are likely higher. Union County, which has dedicated staff to gang intelligence, has identified 204 gang members out of a population of 1066.

Gangs thrive on the vulnerability of inmates in jail. Gangs derive strength from numbers, and jails prove fertile grounds for recruiting. Even individuals who resist joining a gang on the outside succumb out of fear of the unknown and an instinct for self-preservation. Rivalries among competing gangs are intense, and hostilities break out. In New Jersey county jails, gangs have executed contract "hits" upon members of rival gangs; robbed or extorted inmates in packs of gang members; engaged in smuggling of cell phones, drugs, and other contraband; and arranged for retaliatory crimes to be committed on correctional staff outside of the jail by its members. Gangs "discipline" their own wayward members with violence. Even the very small Cape May County jail

(population of 343 in July, 2010) recorded 45 incident reports related to or motivated by gang activity in 2010.

C. Contraband Of All Kinds Is A Significant Security Risk In Jails.

Petitioner gives short shrift to the institutional imperatives of safety, and the threats posed by contraband and gangs. In particular, his arguments are largely based on the misconception that the only types of contraband that matter are weapons and drugs. Pet'r Br. 10, 30. Petitioner severely underestimates the threat of contraband to order in county jails.

New Jersey county jails uniformly define contraband broadly in their written policies. Contraband includes ammunition, explosives, weapons, hazardous chemicals and gases; unauthorized drugs or medications, currency and stamps, and communication devices. But it also includes any item not authorized by the jail (or unauthorized amounts of permitted items). *See* Peter M. Carlson & Judith Simon Garrett, PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 63 (2d ed. 2008) ("Contraband is any item or article that an inmate is forbidden to possess.")

Weapons and escape implements are an obvious threat to order in jails. So too are drugs. Inmates under the influence of drugs or other intoxicants can become violent. The drug trade can induce violence. Many inmates who were not addicted on the outside begin using drugs on the inside.

But even everyday items that are innocuous on the outside are dangerous within a jail. Lighters and

matches are fire and arson risks or potential weapons. Cell phones are used to orchestrate violence and criminality both within and without jailhouse walls. Pills and medications enhance suicide risks. Chewing gum can block locking devices; hairpins can open handcuffs; wigs can conceal drugs and weapons. Gang paraphernalia can incite assaults or be used for recruiting. Fabrics and clothing can be used to make dummies or fashion escape outfits. *See* Carlson & Garrett, *supra*, at 64 (discussing fire, hygiene, and concealment risks of ordinary property, and recommending strict limitations on medicine, clothing, and newspapers and magazines an inmate may possess). Inmate ingenuity in the manipulation of contraband knows no limits.

Most importantly, any items that are valued and scarce portend disruption in jail. Contraband fosters a black market in desired goods within the jail. And, in jail, the strong prey on the weak. If an inmate has jewelry or clothing, or drugs, or tobacco, or money that another desires, he or she is at risk of an attack or robbery or extortion. The economic value of contraband feeds the propensity to violence. An outbreak of violence between two inmates puts other inmates and also correctional staff at risk, and can be a spark that leads to a broader conflagration (particularly, if the incident involves members of rival gangs).

Gangs, rapacious by nature, seek to dominate the contraband trade in prison. Contraband is a source of power and control and profit. It does not matter whether a gang member brings the drugs or other contraband into the jail; the contraband will end up

in the hands of the strongest members or groups, and generally those are gangs. Gangs organize to accumulate contraband; they orchestrate thefts, commit assaults, and approach inmates in packs to take the contraband from the weak.

Gangs are not content simply to control contraband that happens to come into the jail. Recorded conversations indicate a constant flow of contraband into the jail. Gangs orchestrate the smuggling of contraband into jail (using contraband cell phones to maintain constant telephonic contact with outside members); gangs particularly value drugs and material that can be fashioned into weapons (shanks). Gangs target inmates with access to the outside world to promote contraband smuggling: for example, they coerce inmates who are serving sentences only on the weekends ("weekenders") into smuggling contraband into the jail, knowing that under current New Jersey law these inmates are not likely to be strip-searched. Even though these are supposedly among the lowest-risk inmates, weekender inmates have been discovered smuggling drugs and tobacco products into county jails.

To be sure, there are many channels of contraband inflow into jail besides new commitments. Gangs corrupt correctional officers to sneak contraband in, and abuse contact visits. But a jail will never gain satisfactory control of contraband if certain known smuggling channels – like "mules" committed on nonindictable offenses – remain open.

Because contraband is one of the major sources of disorder in prison, particularly in the modern era of gang dominance in the prison population, correctional

officials must have the proper tools in their arsenal to stem the tide of contraband into county jails.

D. Petitioner's Reasonable Suspicion Rule Would Deprive Jails Of The Power To Control The Influx Of Contraband, And Thus Increase Violence and Disorder.

Petitioner proposes that the Fourth Amendment should restrict jails from conducting strip searches on admittees absent "reasonable suspicion," which he defines as arising from three circumstances: (1) a present or prior offense that is "serious" (*i.e.*, indictable) or involves drugs or weapons; (2) indications in the facts of arrest of a purposeful attempt to gain admission to the facility; or (3) some manifestation of risk of contraband smuggling during the initial entrance and preliminary search at the jail. Pet'r Br. 10. Petitioner's ill-conceived rule reflects misapprehension of the realities and purposes of jail commitment procedures.

1. Officers Conducting Intake Searches Do Not Typically Have Information On Criminal History And The Circumstances Of Arrest.

Recognizing that offense of commitment is itself an inadequate predictor of contraband risk, *see infra* at 15-16, petitioner attempts to give his proposed test a patina of reasonableness by suggesting that jails may constitutionally conduct strip searches based on criminal history or the circumstances of the offense. That argument simply betrays the impracticality of petitioner's position. Criminal history and the circumstances of arrest are typically unknown to the searching officer at the time of admission.

The essential purpose of jail intake procedure is to process and secure the inmate as expeditiously as possible, consistent with jail cleanliness and security. In a typical booking procedure, the admittee is brought to the receiving area by the transporting officer (who is not necessarily the arresting officer). The booking officer reviews the commitment document (such as an arrest, bench, parole, or probation warrant, or sentencing order) for validity and accuracy, and verifies the admittee's identity. The commitment document contains very little information, usually disclosing information such as the charges of commitment, the relevant statute, and (if applicable) sentencing and bail information. After having verified the accuracy and validity of the commitment document, the booking officer gathers necessary personal and medical information; records and takes custody of inmate property; takes fingerprints; and determines if the admittee requires special handling (such as medical treatment). *See, e.g.*, Resp'ts Essex County Correctional Facility and Essex County Sheriff's Dep't Br. 4-5 (describing Essex County intake procedure). After this initial processing, the inmate is placed in a holding area to await a search. Because most correctional staff are needed to manage the confined population, only 1-3 officers (depending on the size of the institution) are typically available to conduct searches.[4]

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[4] The vast majority of New Jersey county jails also ensure jail hygiene by mandating that new admittees shower as part of the intake procedure. Showers help prevent the spread of deadly bacteria (like MRSA), ensure the cleanliness of jails, and aid in the control of body vermin. Showers also avoid the security risk of placing inmates with offensive body odor (from the

(continued...)

The searching officer typically has no access to the admittee's criminal history or the facts of arrest, nor is it feasible to make evaluation of such data part of intake procedure. It is true (as Petitioner points out, Pet'r Br. 34) that jails do eventually research criminal history for purposes of inmate classification, but those are time-consuming inquiries that occur well after admission. Searching officers cannot be diverted from pressing tasks to conduct individualized criminal-history research on admittees. That would only delay the process of admission, and increase the numbers of admittees and the length of waiting times in holding areas. Such a procedure would delay needed medical attention or screening, and give new admittees a longer period of time to ingest or conceal contraband, or use contraband to hurt other admittees, themselves, or staff. Jails will not incur these security risks.

Nor do searching officers have access to (or time to evaluate) information about the circumstances of arrest, beyond the usually terse description of charges in the commitment document. The officer who has transported the admittee from a police station or municipal lock-up or court to the county jail is often not the arresting officer. Furthermore, the function of the transporting officers is simply to transfer custody to the jail securely; these municipal, state, or federal officers are not responsible for the security of county jails. They have many other duties

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circumstances of arrest or their detention in municipal facilities) in cells with other inmates.

(including security of the other transported inmates), and do not typically make themselves available to debrief jail personnel on the facts of arrest or the contraband risks the admittee poses, even if they had such knowledge. Petitioner's arguments are not grounded in reality.

Moreover, any constitutional rule of reasonable suspicion predicated on criminal history or behavior at the time of arrest would draw jails into a quagmire and breed more prisoner litigation about whether the jail in fact had reasonable suspicion to conduct a search. Does one felony drug offense 10 years ago give reasonable suspicion, for example? It would be almost impossible to devise robust standards for applying criminal history. This Court should not go down this path. Part of the reasons why strip searches should be standard is that the factors affecting contraband risk are multitudinous but not easily predicted, and vesting these decisions in individual correctional officers is more likely to lead to arbitrary conduct.[5]

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[5] It is also perverse to apply to *inmates* – who have been arrested for or convicted of violations of the law, and who are a significant contraband risks – the same individualized suspicion standards that apply to searches of jail and prison guards and police officers, *see, e.g.*, *McDonell v. Hunter*, 809 F.2d 1302, 1306-07 (8th Cir. 1987); *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 489-90 (9th Cir. 1986); *Sec. & Law Enforcement Emp. v. Carey*, 737 F.2d 187, 204 (2d Cir. 1984); to prison visitors, *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996), and even to students who have greater privacy expectations in school than inmates do in correctional facilities, see *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2639 (2009); *N.J. v. TLO*, 469 U.S. 325, 338-39 (1985) ("We are not yet ready to hold that the schools

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2. The Offense Of Commitment Is Not An Adequate Predictor Of Risk Of Contraband.

As Petitioner implicitly concedes, the offense of commitment alone is not a sound basis for predicting the risk of contraband. First, many forms of contraband – such as cigarette lighters, matches, tobacco products, jewelry, money, cell phones – obviously do not correlate with whether the offense of commitment is indictable or not. Second, in the wardens' experience, even as to drugs and weapons, the offense of commitment is not a robust enough predictor to rely upon exclusively. Individuals who commit minor crimes often also commit serious crimes; for example, offenders who commit motor vehicle violations are often found to be transporting guns or drugs. Even minor offenders without significant criminal proclivities may fashion defensive weapons, or secrete contraband to "buy" protection. Concealment of contraband is also highly correlated with certain types of minor crimes; for example, shoplifting is typically a misdemeanor, but many shoplifters are drug users who rely upon shoplifting to fund their drug habits. Shoplifters have a tendency to conceal drugs in underwear or body orifices, tape them in armpits, or place them above dentures. Finally, nonindictable offenders often are greater contraband risks because they are not searched thoroughly prior to being brought to the county jail. Police are much less likely to do a careful

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(...continued)

and the prisons need be equated for purposes of the Fourth Amendment.").

pat search of nonviolent misdemeanants than other offenders, and municipalities that hold arrestees pending arraignment often do not do pat-searches, or do them poorly.

Even if *arguendo* indictable offenders did present greater risk, there are many circumstances in which indictable offenders can coerce or coax non-indictable searchable offenders to carry contraband for them. Both types of offenders may be held in the same municipal detention facilities, or transported together to the county jail. And, as noted above, some jails place both types of offenders together in temporary holding areas or cells. Temporary holding may only be a few minutes, or could last several hours depending on circumstance. In smaller institutions, there may only be a few admittees awaiting search; in larger jails like Passaic County, there may be as many as 30-40 admittees awaiting a search in the holding facility. In those holding areas, indictable offenders often have the opportunity to coerce or persuade nonindictable offenders to smuggle contraband for them, knowing that the latter will not be searched.

It is simply a fallacy to presume that the smuggling of contraband into our nation's jails can be dealt with effectively by limiting search authority according to the nature of the charged offense.

3. Concealment Of Contraband Is A Significant Risk Across All Categories Of Detainees.

Petitioner also conjures up a fictional world wherein all admittees are arrested on the spot (or by surprise), and suggests that it is thus fanciful to

think that admittees will have the opportunity to conceal contraband. *See* Pet'r Br. 30.

Once again, petitioner's arguments disregard the complexity of reality. There are numerous circumstances in which there is opportunity for concealment of contraband by offenders of all stripes. Many admittees, who had been out on bail, appear for court on sentencing day knowing they are going to be sent to the county jail; indeed, most have already pled (or agreed to plead) guilty. Those persons can and do conceal contraband to aid them in their prison stay, knowing they generally will not be strip-searched if they are sentenced for a misdemeanor. Other admittees turn themselves in on arrest warrants, and can conceal contraband in advance. Inmates serving weekend sentences arrive at jail knowing they will not be searched, and they too can and do conceal contraband. Even persons who are arrested without notice are often detained in municipal or police-station detention where they are inadequately frisked or pat-searched; those individuals have the opportunity during their temporary detention to secrete contraband on their persons.

The proof is in the pudding. Even though New Jersey significantly restricts the authority of jails to conduct strip searches, *see* N.J. Stat. § 2A:161A-1; N.J. Admin. Code §§ 10A:31-8.4 to -8.7, New Jersey county jails routinely discover surprising amounts of contraband during admission.

The following examples are illustrative. In Atlantic County, officers have seized more than 100 items of contraband from admittees during searches since 2009, including a loaded semi-automatic hand gun. Passaic County reports that in the first half of

2011 alone, there were 3 incidents in which weapons were recovered from strip searches on intake (a metal shank, a sharpened plastic toothbrush secreted in the admittee's anus, and a razor); 3 incidents in which drugs or drug-related items were recovered (42 pills, crack pipe, green substance concealed in admitee's anus); and 2 other incidents involving cigarettes and jewelry. Both the green substance and the toothbrush weapon were hidden in the admittee's anus. In Bergen County, officers have found condoms filled with pills, heroin, hypodermic needles, and paper money concealed in orifices, and a .25 caliber gun concealed under the scrotum and missed on a pat search by arresting officers. In Ocean County, hypodermic syringes, illicit drugs, medication, smoking material, or cash have been discovered, and pills, cigarettes, drugs have been found stashed in the arrestee's vagina or anus. Middlesex County reports that seized contraband includes box cutters, cell phones, currency, and tobacco, and that admittees have stashed cell phones, drugs, and tobacco products in their bodies. In Cape May County, the contraband seized included butcher knives, small handguns, controlled dangerous substances, drug paraphernalia, crack pipes and hypodermic needles. Salem County reports numerous seizures of drugs, lighters, matches, knives, cell phones, cash, jewelry, medication, and tobacco products; the cell phone was smuggled in the admittee's anus. Sussex County reports incidents of drugs and tobacco being hidden in body orifices or taped to the inmate's back or groin area, including a woman who transported four airline bottles of vodka in her vagina. Indictable and nonindictable offenders alike have been found to have hidden contraband on their persons. Given strip-

search restrictions in New Jersey, this likely represents but a small part of the contraband flow into county jails.[6]

4. Petitioner Exaggerates The Trauma Of Strip Searches.

Petitioner greatly exaggerates the trauma associated with strip search (and plaintiff accounts associated with damages litigation must be discounted). *See* Pet'r Br. 22-23. In the wardens' experience, for nearly all admittees, visual strip searches of typically 3-5 minutes in duration and conducted respectfully as standard and regulated procedure by officers of the same sex, are not traumatic for the offender. The Court must also recognize that expectations of privacy in the jail setting are reduced by the necessities of confinement and security. Most inmates are confined in cells where they undress and use the cell toilet in the presence of cellmates, and sometimes in the view of correctional staff. Many inmates, particularly nonindictable offenders, understand that a standard strip search of all inmates upon admission serves to protect them from more dangerous and violent inmates.

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[6] Inmates are typically scanned for metallic contraband by use of devices such as the Body Orifice Scanning System ("BOSS Chair") and metallic wand detectors, but those detectors cannot detect non-metallic contraband, including polymer weapons.

5. This Court Should Not Constitutionalize A Rule That Would Invite Strategic Behavior By Jail-Savvy Inmates Or Gangs.

The paramount concern of a county jail is the security of its personnel and its inmates, and contraband jeopardizes security. This Court should not adopt a constitutional rule that invites strategic behavior on the part of jail-savvy inmates and (in particular) gangs. Jail inmates are highly recidivist (69% of Ocean County inmates have been previously jailed, for example). Recidivists are wise to the ways of the jail system; even non-recidivists will know the word on the street regarding search risks. A person bound for jail who has the opportunity to conceal contraband and knows she cannot be strip-searched can conceal contraband on her body with impunity.

The risk of strategic behavior is heightened with the gangs that infest county jails. Gangs are already coercing or enticing "weekenders" to smuggle contraband for them as "mules." They are no doubt staging arrests for the purposes of smuggling. One can be arrested for very minor infractions such as parking or motor-vehicle violations, or failure to pay child support or a fine, as petitioner points out (Pet'r Br. 25). That means it is very easy for gangs (at low cost to the "mule") to stage arrests to smuggle weapons, cell phones, drugs, currency, and contraband into jails.

This Court should not forever disable county jails from preventing this form of contraband smuggling that contributes to disorder and criminality in jails. Petitioner's individualized suspicion rule would foreclose the adoption of standard search policies

even if jails experienced a surge in contraband smuggling. Jails are just beginning to deal with an evolving, brave new world of gang penetration; the full ramifications of gang activity in the jail system are not fully understood, certainly not yet by political actors. The Association and its members fervently oppose the current restrictions imposed by New Jersey state law as contrary to safe correctional practice, but at least hold out the hope of repeal or modification with more institutional experience. A constitutional holding that enshrines petitioner's proposed rule would extinguish the possibility of state legislative adaptation to changing security imperatives in county jails, and would be both unwarranted and unwise.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

AUG 25 2011

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON, ET. AL,
Respondents

**On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit**

BRIEF ON BEHALF OF *AMICI CURIAE*, POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 249, POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 199, POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 177, POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 109, AND POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 167, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Amici curiae are public sector labor unions affiliated with the New Jersey State Policemen's Benevolent Association that serve as the exclusive bargaining representatives for corrections officers in several counties throughout the State of New Jersey.[2] Each individual local union has a substantial interest in assuring that its members work in the safest possible environment. While no prison can be made completely safe for the men and women who work within its walls, certain precautions can enhance safety within the facility. Visual inspections of inmates prior to their placement in the general population is a simple and constitutional means of increasing the safety and wellbeing of corrections officers.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Blanket letters of consent for the filing of *amicus curiae* briefs have been filed with the Clerk of the Court pursuant to Rule 37.3.

[2] Policemen's Benevolent Association (hereinafter, "PBA") Local 249 is the exclusive representative of rank-and-file corrections officers employed by Burlington County. PBA Local 199 is the exclusive bargaining agent for rank-and-file corrections officers employed by Union County. PBA Local 177 is the exclusive bargaining agent for all corrections officers employed by Somerset County. PBA Local 109 is the exclusive bargaining agent for rank-and-file corrections officers employed by Hudson County. PBA Local 167 is the exclusive bargaining agent for rank-and-file corrections officers employed by Mercer County. Each individual local is affiliated with the New Jersey State Policemen's Benevolent Association.

Amici seek to provide this Court with the unique perspective of the men and women who benefit most from visual inspections – corrections officers. The United States Court of Appeals for the Third Circuit carefully balanced the rights of prisoners with the need to maintain a secure prison environment and found that the visual inspections were necessary to maintain institutional security at the Burlington and Essex County jails. *Florence v. Bd. of Chosen Freeholders of the County of Burlington*, 621 F.3d 296, 308 (3rd Cir. 2010), *cert. granted*, 79 U.S.L.W. 3442 (U.S. Apr. 4, 2011). As these visual inspections protect corrections officers, *Amici* file this brief in support of the Respondents in this matter.

SUMMARY OF THE ARGUMENT

As this Court has recognized, "[a] detention facility is a unique place fraught with serious security dangers." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Each day, corrections officers leave their homes and go to work without any guarantee that they will return safely. The unions that represent corrections officers are duty bound to ensure that employment within a correctional facility is as safe as possible under the circumstances.

Visual inspections of individuals entering the general inmate population is the first line of defense for corrections officers. This simple precaution advances officer safety and prevents an already dangerous environment from becoming deadly. A visual inspection can uncover secreted contraband, identify certain contagious illnesses and uncover gang affiliations. The information obtained through these inspections increases the security of the prison, and thus the safety of corrections officers and civilian employees.

This Court has held that in the context of strip searches, inmate privacy interests must give way to the safety and security of the prison environment. *Bell*, 441 U.S. at 559. Corrections officers rely on visual inspections to keep them safe. Accordingly, this Court must affirm the Third Circuit's decision in this matter.

ARGUMENT

VISUAL INSPECTIONS OF INMATES ENTERING THE GENERAL POPULATION OF A PRISON OR JAIL ARE A CONSTITUTIONAL AND EFFECTIVE MEANS OF ENSURING THE SAFETY OF CORRECTIONS OFFICERS.

Visual inspections of inmates entering the general population of a correctional facility are essential for the safety and well being of corrections officers. Simply observing an inmate's body prior to his or her incarceration in the general population of a county jail can provide corrections officers and jail administrators invaluable information concerning the prisoner. A visual inspection can reveal contraband such as weapons and drugs. A trained corrections officer can also identify certain contagious diseases as well as possible gang affiliation during a visual observation. Disallowing visual inspections will place corrections officers at a stark disadvantage in the constant struggle to maintain control of the prison population.

The safety of corrections officers is of paramount importance to the *Amici*. In 2005, the New Jersey Department of Corrections released a report from the Commission on Safety and Abuse in America's

Prisons.[3] The statistics contained in this report are shocking. Nationally, on average, there were 88 inmate assaults on officers per day in 2001. *Id.* There were 39 deaths in the line of duty between 2000 and 2003. *Id.*

A 2007 study, entitled *Improving Correction Officer Safety: Reducing Inmate Weapons*, recognized that while the Federal Bureau of Investigation ("FBI") keeps detailed records of police officers killed in the line of duty, there are no comparable statistics with regard to corrections officers.[4] This study found that in 1990, there were 10,731 reported assaults by inmates on federal corrections facility staff. *Id.* at 2-3. By 1995, the number of assaults rose to 14,165. *Id.* at 3. The nearly one-third increase in the number of assaults was accompanied by an increase in violence. While no officers were killed as a result of the assaults reported in 1990, fourteen (14) corrections officers and staff members were killed in 1995. *Id.* at 3.

Inmate on inmate assaults are twice as common as assaults on corrections officers. *Id.* "Approximately 3% of prisoners are assaulted and injured by other prisoners each year in federal prisons. The probability of similar assaults is almost four times higher in state prisons." *Id.* These assaults place corrections

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[3] *The Findings and Recommendations of the Commission on Safety and Abuse in America's Prisons: Hearing Before the Subcomm. On Corrections and Rehabilitation of the S. Comm. on the Judiciary*, 109th Cong. 608 (2006) (statement of William Hepner, Program Development Specialist, New Jersey Department of Corrections).

[4] Paul J. Bierman, *Improving Correctional Officer Safety: Reducing Inmate Weapons* (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/220485.pdf.

officers in grave danger, as they must enter the fray between two or more violent inmates to quell the altercation. In light of these grim statistics, the precautionary policy of visual inspections as a means of protecting corrections officers must be allowed to continue.

The visual inspection at issue in this appeal was performed on an individual who was about to enter the general population of the Burlington County Jail. *Florence*, 621 F.3d at 299. Incarceration in the general population exposes inmates to corrections staff as well as other inmates. A visual inspection of each inmate entering the general population, regardless of the crime for which they are accused or convicted, is a simple and egalitarian means of ensuring the safety of the corrections staff as well as the inmates.[5]

At the Burlington County Jail specifically, safety is at a premium. This particular jail employs an open configuration where most prisoners are not confined to cells, but comingle in common areas. Corrections officers are deployed throughout the inmate population. These officers do not keep watch over their charges from a protected tower or booth, but are instead stationed amongst the prisoners themselves. As the inmates move throughout the jail facility, corrections officers in Burlington County are commonly alone with large numbers of inmates. For example, as inmates move to and from their

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[5] This Court has declined to draw a distinction between pretrial detainees and convicted inmates and should not do so here. "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979).

recreation period, two officers are locked in a sally port with upwards of sixty inmates. *See* App. A, pp. 5a-7a. For protection, these officers are provided with a radio and a whistle. *See* App. A, p. 7a.

The ratio of officers to inmates in the dining hall is even more disproportionate. Burlington County policy requires five corrections officers to supervise eighty inmates in the dining hall. *See* App. A, pp. 7a-8a. However, there are instances when fewer officers are present in the dining hall when the prisoners dine. *See* App. A, p. 7a. Inmates will always outnumber corrections officers in a prison facility. Therefore, it is imperative that every precaution must be taken to ensure that corrections officers are as safe as possible.

At a recent Interest Arbitration hearing, PBA Local 249 President Robert Swenson had the opportunity to testify concerning the conditions within Burlington County's two jails.[6] Officer Swenson serves as a corrections officer as well as the Union president. He reported that the inmates housed within the County's jails are younger than in the past, and have become more violent and aggressive. *See* App. A, p. 2a. The level of respect for corrections officers has similarly decreased in the ten years since Officer Swenson began working in Burlington County. *See* App. A, p. 2a.

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[6] In New Jersey, police officers and firefighters may invoke Interest Arbitration pursuant to N.J. STAT. ANN. §34:13A-16, *et. seq.*, to determine any unresolved issues concerning terms and conditions of employment following collective negotiations. Pursuant to N.J. STAT. ANN. §34:13A-17 (2011), the presiding arbitrator may administer oaths. Officer Swenson testified under oath. The relevant portions of the sworn testimony of Officer Swenson, as cited herein, is included in the attached appendix.

Altercations with inmates are a common experience throughout New Jersey's County Jails. In Burlington County, six corrections officers have recently been forced to retire as a result of injuries suffered at the hands of inmates.[7] In June 2011, a corrections officer was injured in a small-scale riot at the Somerset County Jail. Officers in Union, Mercer and Hudson Counties have also been injured in altercations with inmates.

For corrections officers, danger lurks around every corner of the jail. At any time, inmates can become violently aggressive towards corrections officers or each other. Reducing the opportunity and intensity of these altercations is vital to maintaining a safe prison environment. Visual inspections are the first line of defense for corrections officers. Such inspections help reduce the amount of contraband passing through to the general population, which reduces the opportunity for inmates to smuggle weapons and drugs into the jail. These inspections are also effective in identifying an inmate's gang affiliation. This

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[7] Corrections Officer Ernestine Scott was involved in an altercation with an inmate in the clinic area, leaving her with permanent neck and shoulder injuries. *See* App. A, p. 9a. She was eventually forced to retire as a result of these injuries. *Id.* Corrections Officer Kelvin Mack was struck twice in the back of the head by a mentally ill inmate. *Id.* He was forced to retire as a result of his injuries. *Id.* Corrections Officer Cyphers tried to break up a fight in the dining hall between two inmates assigned to work in the kitchen. *See* App. A, p. 10a. She injured her neck in this altercation and was forced to retire. *Id.* Sergeant Ortiz sustained a back injury when assaulted by an inmate and was forced to retire early. *Id.* Corrections Officer Frazer has been out of work for a year and a half and is currently seeking retirement after he was violently struck several times by an inmate who is a high ranking member of the Bloods street gang. *Id.*

prevents rival gang members from sharing a cell and allows officers to segregate gang members from each other. In addition, a visual inspection can identify a prisoner with an infectious disease and prevent its transmission to corrections officers and other inmates.

1. The introduction of contraband into the general population of a prison can be deadly for corrections officers. During the PBA Local 249 Interest Arbitration hearing, Officer Swenson testified concerning the changes to the visual inspection policy at the Burlington County jail following the District Court's decision in this matter.[8] He testified, "[w]e can't really determine as to whether or not an individual that's being introduced into the facility has any type of concealed contraband, weapons or anything like that that can make it inside the secured perimeter of the jail." *See* App. A, p. 3. The danger posed to corrections officers by the introduction of a weapon into the general population is obvious. Fortunately, the Third Circuit recognized that visual inspections are critical to officer safety and overturned the District Court's decision. A return to the District Court's decision will place corrections officers at the Burlington County Jail and elsewhere in grave peril, as they will have lost their first line of defense against the introduction of contraband into the general prison population.

This Court has acknowledged that the smuggling of contraband into our nation's correctional institutions is a real and serious concern. *Hudson v. Palmer*, 468

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[8] The Interest Arbitration proceedings occurred after the District Court's decision in this matter, but before the Third Circuit's reversal.

U.S. 517, 527 (1984) ("[A]ttempts to introduce drugs and other contraband into [prison] premises is one of the most perplexing problems of prisons."); *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) ("drug smuggling and drug use in prisons and drug use in prisons are intractable problems"); *Block v. Rutherford*, 468 U.S. 576, 588-89 (1984) ("We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal detention center in the country.").

In *Dodge v. County of Orange*, 282 F.Supp.2d 41 (S.D.N.Y. 2003), the Southern District of New York noted that any contraband introduced into the prison environment is dangerous. *Id.* at 46-7. "The dangers posed by weapons, ammunition or drugs are obvious. Less apparent is the danger presented by money, cigarettes or even excess prison issue items." *Id.* at 47. These items are dangerous because they create barter economies, which foster competition among inmates. *Id.* These economies also create a class system among inmates, which can lead to violence against the "haves" and "have nots." *Id.*

One of the more obvious points of entry for contraband into the prison facility is at intake. *See Bull v. City of San Francisco*, 595 F.3d 964, 967 (2010) (recognizing that jail administrators at San Francisco Jail No. 9 believed that "the greatest opportunity for the introduction of drugs and weapons into the jail occurs at the point when an arrestee is received into the jail for booking and, thereafter, housing."). Thus, the most obvious place to take precautionary measures to deter smuggling is at intake, where inmates are taken from the outside and placed into the prison system.

Smuggling weapons and drugs into prisons is a very real problem. In August 2009, an overweight individual was actually in jail for fourteen hours before he admitted that he had hidden a gun and two clips between layers of his fat.[9] A visual inspection of this inmate would have revealed the weapon.

Keeping contraband out of prisons can be the difference between life and death for a corrections officer. Weapons brought in from the outside can turn a run of the mill fistfight between inmates into a murder. Corrections officers attacked by inmates with smuggled weapons have no means to defend themselves. While a shank-proof vest may protect against primitive "jailhouse weapons," it cannot protect against all of the "outside" weapons an inmate can smuggle into the prison.

Plaintiffs in this case have repeatedly argued that a less intrusive means to prevent smuggling can be employed to reduce the introduction of contraband into the prison environment. Specifically, Plaintiff alleged below that the Body Orifice Scanning System ("BOSS Chair") is a non-intrusive means to reduce smuggling. The BOSS Chair, however, is designed to detect metal objects concealed in various body cavities. *Florence*, 621 F.3d at 310. The effectiveness of the BOSS Chair for this limited purpose is questionable. For example, in the Somerset County Jail, corrections officer and PBA Local 177 President Ruben Crespo reported that the facility's BOSS Chair regularly picks up metal rebar in the flooring and is of limited utility in preventing smuggling.

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[9] Elizabeth Scarborough, *HPD Inmate Hides Gun in Fat Layers*, Click 2 Houston, August 6, 2009, http://www.click2houston.com/news/20301265/detail.html.

Moreover, inmates who know that the BOSS Chair will be used can easily circumvent its detection capabilities by smuggling non-metallic weapons into the prison. In addition, the BOSS Chair is not capable of detecting drugs secreted on an inmate and destined for the general prison population. *Id.*

Drug smuggling also decreases the safety of the jail environment. When a small number of inmates control the supply of drugs to the prison population, fights between inmates can erupt. These fights are a serious threat to the safety of corrections officers. Smuggling drugs can also create barter economies, which skew the general order of the prison facility. Moreover, illegal drug use may embolden inmates to be more aggressive towards officers because they are not in control of their faculties.

Visual inspections are a simple and constitutional means to prevent the introduction of drugs and weapons into the general prison population. Reducing drugs and weapons will create a safer prison environment. Corrections officers and inmates both benefit from a safer environment. If these visual inspections are outlawed, corrections officers will be the most impacted. Inmates have nothing but time on their hands to plot and scheme. They will find ways to introduce weapons into the general population, especially once it becomes known that certain individuals will be permitted to enter the general population without undergoing a visual inspection. The Third Circuit's decision gives officers a constitutionally firm preventative measure of protection against the plotters and therefore must be affirmed.

2. Visual inspections also play a vital role in the identification of certain contagious illnesses prevalent in correctional facilities. A visual inspec-

tion of detainees before they enter the prison's general population can detect highly contagious diseases like methicillin-resistant staphylococcus aureus ("MRSA"), HIV or AIDS. Detecting inmates with these diseases before they enter the general population is essential for the safety of corrections officers as well as other inmates. Contagious diseases can spread through the confines of a correctional facility very quickly. The officers and prisoners are in close proximity, in conditions that are oftentimes less than sanitary.

Identification and treatment of certain illnesses at intake is essential for the safety of the corrections staff. Christopher Briggs is a corrections officer employed at the Burlington County Jail as a transportation officer. *See* App. B, pp. 12a-14a. His duties include driving inmates to the hospital and sitting with them while they are examined. *Id.* Throughout his twenty-year tenure as a corrections officer, he has come across inmates suffering from staph infections, hepatitis, AIDS and sexually transmitted diseases. *See* App. B, pp. 15a.

MRSA is so prevalent in prisons that the New Jersey Department of Health and Senior Services has authored an informative brochure apprising inmates of the risks and how to avoid them.[10] MRSA is a superbug that is commonly found in high numbers in correctional facilities. *Id.* If left untreated, MRSA can cause serious health problems and lead to death. *Id.* MRSA is often detected by the presence of

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[10] New Jersey Department of Health and Senior Services, *MRSA Preventing Skin Infections*, *available at* http://www.state.nj.us/health/cd/mrsa/documents/prison_mrsa_newsletter.pdf (last visited July 29, 2011).

abscesses, cellulitis, boils, carbuncles and impetigo.[11] The infection kills between four and ten percent of those who contract it. *Id.*

Visual inspections at intake can identify inmates with MRSA and ensure that an infected inmate is medically segregated and receives the medical care he or she needs. This reduces the likelihood that corrections officers and inmates will become infected. Such visual inspections also reduce the likelihood that a corrections officer will carry infections from the prison to their homes and spread disease amongst their families.

While MRSA is spread through direct contact, other diseases may be spread through bodily fluids. Officer Swenson testified that Burlington County Corrections Officers have reported having feces balls and urine thrown at them. *See* App. A, p. 10a. In addition, "gassing" is common in many jails. "In prison parlance, being 'gassed' is when an inmate combines urine, feces, semen, vomit, mucus, blood and whatever other bodily fluid they can collect and throws it in [a corrections officer's] face."[12] Certain infectious diseases, such as HIV and AIDS can be spread through contact with bodily fluids. Moreover, certain infections that accompany HIV and AIDS,

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[11] Federal Bureau of Prisons, *Management of MRSA* (2011), *available at* http://www.bop.gov/news/pdfs/MRSA.pdf.

[12] Brian Dawe, *Behind the Walls*, American Cop Magazine, March 2, 2006.

such as Kaposi's Sarcoma, can be identified through a visual inspection.[13]

Visual inspections are vital to prevent inmates with contagious diseases from entering the general prison population. While many inmates refuse to disclose whether they are stricken with a particular illness, some illnesses can be detected by simply observing the inmates' body. MRSA is one such highly contagious disease. Visual inspections are necessary to decrease the likelihood that corrections officers will contract an infectious disease.

3. There is no doubt that gangs are becoming increasingly prevalent in correctional facilities throughout the Country. Officer Swenson recently testified that, at the Burlington County Jail, the gang problem has increased considerably. *See* App. A, pp. 2a-3a. The Burlington County Jail houses Bloods, Crips, Latin Kings and other gangs. *See* App. A, p. 2a. The Bloods represent the highest percentage. *Id.* In Burlington County, the gangs are mixed in with the general population. *Id.*

Prior to the District Court's decision in this matter, corrections officers at intake would utilize visual inspections to identify an inmate's gang affiliation by the presence of gang tattoos. *See* App. A pp. 3a-4a. However, following that decision, that task became more difficult. Officer Swenson testified that after visual inspections stopped: "[t]he actual individuals themselves that are being incarcerated are getting smarter. So they're not tattooing themselves in obvious places that we can check anymore as

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[13] PubMed Health, *Kaposi's Sarcoma* (2010), http://www.ncbi.nlm.nig.gov/pubmedhealth/PMH0001682/.

much." *See* App. A, p. 3a. With regard to gangs, corrections officers rely on visual inspections to identify gang members and keep them away from inmates aligned with rival gangs. Disallowing such visual inspections puts both inmates and corrections officers at risk.

In 2009, the New Jersey State Commission of Investigation ("SCI") authored a study entitled *Gangland Behind Bars*.[14] The investigation revealed that nearly 150,000 documented members of criminal street gangs are currently incarcerated in federal, state and local correctional facilities around the nation. *Id.* at 11. Among the current inmate population of State prison facilities in New Jersey, which consists of over 22,000 inmates, 4,600 have been officially identified by the New Jersey Department of Corrections ("DOC") as gang members. *Id.* This number, which many experts find conservative, does not include inmates considered "non-member associates." *Id.* As of 2009, the DOC has reported that 75 to 80 new gang-member inmates were entering the state prison system each month. *Id.*

The SCI's investigation recognized that county jails are a major conduit into the state prisons. *Id.* Thus, as the number of gang-affiliated inmates rises at the

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[14] New Jersey State Commission of Investigation, *Gangland Behind Bars: How and Why Organized Criminal Street Gangs Thrive in New Jersey's Prisons . . . And What Can Be Done About It* (2009), *available at* http://www.state.nj.us/sci/pdf/Gangs%29sci%20Full.pdf.

state level, the number of gang members at the county level necessarily rises at a greater rate.[15]

Gang assaults in prison have become such a problem that the New Jersey Department of Corrections created a policy designed to isolate and rehabilitate gang members. *See Fraise v. Terhune*, 283 F.3d 506, 509 (3rd Cir. 2002). Under this policy, prison officials were permitted to transfer "core" members of certain gangs and transfer them to the Security Threat Group Management Unit ("STGMU"). *Id.* This policy was specifically designed to reduce assaults on staff and inmates. *Id.* One of the means employed by the DOC to identify gang members for transfer to the STGMU was by the presence of gang tattoos. *Id.* at 510. Justice Alito, then serving on the Third Circuit Court of Appeals, authored *Fraise* and upheld New Jersey's STGMU policy in part because it would reduce the danger to corrections officers. *Id.*

The New Jersey Legislature includes the presence of gang tattoos as one of the seven criteria indicating the existence of individuals associated in a criminal street gang. *See* N.J. STAT. ANN. §2C:33-29 (2011). Many gangs have tattoos easily identifiable to a trained corrections officer. Visual inspections are necessary to identify the tattoo and appropriately identify the gang affiliation.

Very few, if any, gang members are willing to simply tell a corrections officer that they are members of a particular gang. Indeed, many gang members find it advantageous to downplay their respec-

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[15] The percentage of gang-affiliated inmates at the county level may be higher than that of gang members in the state prison system as not all prisoners incarcerated at the county level graduate to prisons under the purview of the DOC.

tive affiliations. A visual inspection at intake is a simple means to determine whether an individual is a gang member. This, in turn, will allow corrections officers to properly separate rival gang members. Without this line of defense, corrections officials are unable to properly place prisoners within the general population.

Improper placement of an inmate can have deadly consequences. Many gangs are constantly at war. Fights amongst rival gangs are common. Even a small fight within the confines of a prison can become a large-scale conflagration in a matter of seconds. Corrections officers must break up these fights and in so doing, place themselves in harm's way.

A simple visual inspection at intake can identify gang members and allow corrections officers to properly place them in the appropriate area of the correctional facility. Keeping rival gang members separated from each other can decrease the likelihood of prison violence. The less violent a prison is, the safer the corrections officers who work within its walls will be.

4. This Court has consistently considered prison security concerns when determining cases brought under the Fourth Amendment. "Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Bell*, 441 U.S. at 546-47, (*citing Pell v. Procunier*, 417 U.S. 817, 823 (1974)). This central tenant of institutional security has helped shape the Court's jurisprudence with regard to the rights retained by inmates within the prison walls. *See Bell*, 441 U.S. at 546. While a prisoner does not lose his constitutional rights when confined within a

prison facility, those rights must necessarily be limited in order to maintain a safe prison environment.

In the seminal case of *Bell v. Wolfish*, this Court approved the Federal Bureau of Prisons' policy that required inmates at the Metropolitan Correctional Center to expose their body cavities for visual inspection as part of a strip search conducted after contact visits with persons from outside the institution. *Id.* These visual cavity searches provided an opportunity to discover and deter the smuggling of weapons, drugs and other contraband into the facility. *Id.* These strip searches were conducted after contact visits with persons from outside the institution. *Id.* Corrections officials testified that visual cavity searches provided an opportunity to discover and deter the smuggling of weapons, drugs and other contraband into the facility. *Id.*

The inherent dangers of the prison environment played a large part in this Court's determination. "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* This Court noted numerous inmate attempts to smuggle contraband into the prison by concealing it in a body cavity. *Id.* While mindful that the searches are intrusive, and that the occasional corrections officer might conduct an abusive search, the safety concerns outweigh the invasion of privacy. *Id.* This Court found that prison authorities must be given broad discretion to take the steps necessary to ensure the safety of inmates and corrections personnel and to prevent escape and unauthorized entry. *Id.* at 547.

Similarly, in *Hudson v. Palmer*, 468 U.S. 517 (1984), this Court found that an inmate has no reasonable expectation of privacy within his or her cell. Once again, security concerns weighed heavily in the decision. "Within [the] volatile [prison] 'community,' prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take necessary steps to guarantee the safety of the inmates themselves." *Id.* at 526.

This Court further relied on security concerns to affirm a policy denying contact visits to pretrial detainees. *Block v. Rutherford*, 468 U.S. 576 (1984). The contact visits at issue exposed potentially violent detainees to family, friends and prison staff. *Id.* at 586. This Court's analysis focused on the risk, no matter how remote, that innocent people could be taken hostage or used as pawns in an escape attempt. *Id.* The mere risk that the safety of innocent individuals would be jeopardized was sufficient for this Court to deny such visits. *Id.*

Moreover, this Court has recognized the danger of classifying inmates based on perceived security levels. *Hudson*, 468 U.S. at 529; *Block*, 468 U.S. at 587. In *Block*, the Court acknowledged the danger in distinguishing pretrial detainees from convicted criminals with regard to security procedures on the basis of perceived security risks. *Block*, 468 U.S. at 587. "It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits." *Id.* Moreover, the possibility of confusing inmates with a low propensity for violence with those who regularly

engage in violence, drug smuggling or escape is exceedingly high. *Id.*

The *Hudson* Court also recognized the danger of establishing a plan for supposedly random searches. "It is simply naïve to believe that prisoners would not eventually decipher any plan officials might devise for 'planned random searches,' and thus be able to routinely anticipate searches." *Hudson*, 468 U.S. at 529. The random search of a prisoner's cell and locker was deemed valid and necessary to "ensure the security of the institution and the safety of inmates and all others within its boundaries." *Id.*

More recently, the Third, Seventh, Ninth and Eleventh Circuits have determined that blanket visual inspections or strip search policies were permissible under the Fourth Amendment, based largely on this Court's concern for institutional security. *See Florence*, 621 F.3d at 299, *Bull*, 595 F.3d at 977, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008).

The Seventh Circuit, in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), found that forcing an arrestee to remove her clothing and don prison attire while in view of prison personnel did not violate the Fourth Amendment. *Id.* at 967-68. Relying on *Bell v. Wolfish*, the Seventh Circuit gave deference to prison official's justification for the search, which was to locate and control contraband, which in turn increases safety for corrections officers, staff and inmates. *Id.* at 966. The Eleventh Circuit, in *Powell v. Barrett*, similarly relied upon institutional security and safety to justify strip-searching pretrial detainees. The *Powell* Court relied on the expert opinions

of jail administrators, who had determined that anyone to be detained in the general population of a detention facility should be strip-searched in an effort to reduce smuggling. *Powell*, 541 F.3d at 1311.

The Eleventh Circuit's decision also analyzed the security threat an unsearched prisoner can cause to prison personnel. "The [prison] officials usually have no way of knowing whether someone coming into the detention facility after an arrest on a misdemeanor or other minor offense is only a minor offender or is also a gang member who got himself arrested so that he could serve as a mule smuggling contraband in to other members." *Id.* at 1311. The need for the strip searches was obvious:

> The need for strip searches at all detention facilities, including county jails, is not exaggerated. Employees, visitors, and (not least of all) the detained inmates themselves face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband by inmates accused of misdemeanors as well as those accused of felonies.

Id. at 1310.

The Ninth Circuit's *en banc* decision in *Bull v. City of San Francisco* similarly focused on security concerns to validate the City of San Francisco's blanket strip search policy. The *Bull* Court found that searches performed on pretrial detainees before they were transferred into the general jail population was reasonably related to prevent the introduction of drugs, weapons and other contraband into the jails. *Bull*, 595 F.3d at 976. Preventing the smuggling of contraband through these searches served to protect the prison staff as well as the inmates. *Id.* The *Bull*

Court also recognized that due to the "ongoing, dangerous and perplexing contraband-smuggling problem," there were no obvious, easy alternatives to prevent smuggled items from entering the prison. *Id.* at 977.

The Ninth Circuit shared the Eleventh Circuit's concern that all arrestees have the potential to smuggle contraband. *Id.* at 979-80; *see also*, *Powell*, 541 F.3d at 1313. The fact that not everyone is arrested on a moment's notice and may have the opportunity to conceal drugs or weapons on their person is a very real danger, especially in light of the proliferation of gangs in America's prisons.

The Third Circuit below was mindful that the visual inspections at issue were significant intrusions on an individual's privacy. *Florence*, 621 F.3d at 307. However, significant security concerns caused the *Florence* Court to decide this matter similarly to *Bull* and *Powell*. The prevention and detection of contraband prior to its introduction into the general population outweighed the privacy interests of the inmates and thus the Third Circuit overturned the District Court's grant of summary judgment to the Plaintiffs in this matter. *Id.* at 311.

In its decision, the Third Circuit was mindful of the inherent danger of distinguishing between inmates based on the degree of the crime accused. The Court found that: "[i]t is plausible that incarcerated persons will induce or recruit others to subject themselves to arrests on non-indictable offenses to smuggle weapons or other contraband into the facility." *Id.* at 308. A blanket visual inspection policy is a clear deterrent for potential smugglers. A well-established, particularized policy, however, does not. "If non-indictable offenders were not subject to automatic

search it would create a security gap which offenders could exploit with relative ease." *Id.* The Third Circuit further recognized that "[a] detention facility need not suffer a pattern of security breaches before it takes steps to prevent them where those steps are neither 'irrational [n]or unreasonable.'" *Id.* at 310.

As this Court instructed in *Bell*, jailers and corrections officials "should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security." *Bell*, 441 U.S. at 547. The visual inspection policy at issue in this matter is vital to the security needs of a prison.

In *E.E.O.C. v. GEO Group, Inc.*, 616 F.3d 265 (3rd Cir. 2010), the Third Circuit acknowledged that "[a] prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances." *Id.* at 275. Visual inspection of inmates is one such difficult and unenviable task. The inspections are necessary, however, to protect all of the individuals spending time within a prison's walls. This includes the inmates as well as the brave men and women who show up each day to work within the confines of a correctional facility.

This Court has determined that visual inspections are justifiable from both penalogical and constitutional perspectives. *See Bell*, 441 U.S. at 557. As a practical matter, a visual inspection protects corrections officers by preventing the introduction of contraband into the prison environment and fosters the identification of gang membership and communicable diseases. Accordingly, this Court must affirm the Third Circuit's decision in this matter.

CONCLUSION

For the foregoing reasons, this Honorable Court must affirm the Third Circuit's decision in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

ARBITRATION HEARING
CASE NO. IA-2009-115

COUNTY OF BURLINGTON

vs.

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL #249 CORRECTIONS OFFICERS

Arbitrator: Timothy A. Hundley

Computer-aided transcript taken stenographically in the above-entitled matter before DONNA ROSNER a Certified Court Reporter, License No. XI001976, and Notary Public of the State of New Jersey, at the offices of Capehart and Scratchard, Laurel Corporate Center, Suite 300S, 8000 Midlantic Drive, Mount Laurel, New Jersey, on Tuesday, June 8, 2010, commencing at 11:22 a.m.

* * *

[13] Q. And as far as the security level, what is BCDC?

A. BCDC houses all the male inmates that are max. We do have medium, and some medium/minimum classified inmates. So for the most part, it's as the max facility.

Q. And it houses anywhere between medium/minimum up through maximum security inmates?

A. Yes.

Q. And do you know how many inmates are housed at the maximum security facility?

A. The count fluctuates daily. I mean, right now I believe it's probably around 380 to 390, somewhere around in there.

Q. And in your ten years of experience, have you noticed any change in the characteristics of the types of inmates that are being housed in the facility?

A. Yes. The inmates have definitely been getting younger, more violent, more aggressive, you know, as opposed to ten years ago.

Q. Have you noticed any change in the level of respect for the correctional officers [14] from the inmates?

A. Yes, definitely.

Q. How so?

A. It's deteriorated totally. It's horrible, horrible.

Q. Are there any gangs in the maximum correctional facility?

A. Yes, we have gangs.

Q. Which gangs are represented?

A. We have—I think the most amount are the Bloods with the different sex, and we also have some Crips, Latin Kings, and other ones that have been identified, you know, by our gang unit.

Q. The Bloods represent the highest percentage?

A. Yes.

Q. And does the county correctional—Department of Corrections segregate the gang population from the general population?

A. No. They're mixed in with general population.

Q. In your ten years, have you noticed whether or not the gang population has increased, decreased, remained the same?

[15] A. I think its increased considerably.

Q. Are the gang members of particular—of a particular gang, are they segregated from one another or are they allowed to congregate?

A. What they try to do is segregate Bloods from Bloods, and Crips from Crips, and stuff like that, but they're integrated amongst different gang members on different tiers.

Q. Are you familiar with the recent court ruling that prohibited strip searches of inmates?

A. I'm familiar with it.

Q. And has that had any effect on the way that you as a corrections officer have approached your job?

A. Well, it's definitely a setback.

Q. How so?

A. We can't really determine as to whether or not the individual that's being introduced into the facility has any type of concealed contraband, weapons, or anything like that that can make it inside the secured perimeter of the jail.

Q. What about, did it have any impact on the ability to identify gang markings?

[16] A. Yes. The actual individuals themselves that are being incarcerated are definitely getting smarter. So they're not tattooing themselves in obvious places that we can check anymore as much.

Q. You talked about the maximum security facility. What is CWRC? What types of inmates does that facility house?

A. We have medium—the highest classification is medium/minimum for the males out there, and it goes all the way down to minimum. And they basically go out there. There's different details that the inmates leave for: Landfills, cemetery. Buttonwood Hospital, they participate in detail out there. And other inmates are basically housed in which are like the D wings, the medium/minimums that aren't classified to go outside. And there's the female side which houses all the way from minimum all the way to max.

Q. Can you describe—let's go back to the BCDC. Can you describe the physical characteristics or how the jail is setup?

A. Do you mean like—

Q. As far as the different—the

* * *

[22] Q. What's that mean, jumper and ID card?

A. Their jail-issued jumper, and their jail-issued identification card with their name and their inmate information on it.

And you would move them—if they're going inside to rec, you would move them to the top level. They'd line up. If they're going outside, they move to the bottom level, because the rec yard is actually on the third floor going out.

Q. Are the inmates broken up into groups for rec or do all of them go out at the same time?

A. All of them go at the same time.

Q. You said there were two rec officers. How many officers would supervise the movement of the inmates into rec?

A. It would be the tier officer himself would participate in the supervision, and you would also have the booth officer, and just the two rec officers. So it would be four.

Q. Once they're lined—say today they're going outside for rec and they're lined up on the lower level, where do they move from [23] the lower tier to the next spot?

A. They would move into what we call a sally port. Basically it's a small hallway, a small space before they're moved out. And then the tier door would close, the main door, and then they would pop the sally port door leading out to the rec yard, and then the inmates would follow into the rec yard that way.

Q. So the sally port has two locked doors on each end?

A. Yes. You would have the tier door and then the outside rec door.

Q. And the inmates are led into the sally port —

A. Yes.

Q. —through the tier door?

A. Through the tier door.

Q. Is that door then locked before the other door is open?

A. Yes. That's policy.

Q. And where are the rec officers at this time?

A. They are—usually you have one stationed at the tier door taking count, checking the ID cards as they're coming out, and the other [24] one would be in the sally port.

Q. With the inmates?

A. With the inmates.

Q. So at some point in time, are the rec officers locked in the sally port with the inmates?

A. Yes.

Q. Has there ever been any altercations in the sally port that you're aware of?

A. There has been over the years.

Q. How do the officers get to the officers in the sally port to assist them?

A. Well, if there's any type of disturbance a code would be called. It would go through center control, which is basically the nervous system, so to say, of the jail. And they would, you know, put an all page out that there's a Code 2.

Q. What's a Code 2?

A. Minor disturbance or fight, inmates refusing to work, anything which you would require backup for assistance. And officers would respond from wherever areas that they're at to the area that the disturbance is in.

Q. If you have two rec officers in the [25] sally port, how many prisoners would fit in the sally port when they go out to rec?

A. How many is going to rec? Usually E wing, for example, the maximum wing, is only 30 inmates. You can fit all 30 with no problem. It's tight. But some of

the bigger wings—F wing you might have 50, 60 guys going to rec. It's quite confusing.

Q. I'm going to move away from this area for just a second. What type of equipment do you carry when you're a tier officer?

A. A jail-issued radio, a whistle, that's really about it.

MR. METS: That's it.

Excuse me one second.

(Whereupon, discussion held off the record.)

BY MR. METS:

Q. Now, you described two types of movement where half the wing would be out at one time, and then rec where the entire wing would be out. Are there any other types of movements where all the inmates would be released at one time?

A. I mean in the rare occasion where [26] everybody wanted to go to church. All the inmates top and bottom would be open for them to go out.

Q. What about chow?

A. On the bigger wings, no. It's divided top and bottom for security purposes.

Q. Can you describe the physical structure of the dining hall?

A. Actually it's a huge dining hall with tables with four seats, four little stools. It can hold up to 80 inmates in there at a time. And then there's a chow line with two windows that they receive trays, and an entry door from each side of the jail, like what we call pod 2 or A/B side. There is a main entry door. There's also another main entry door on the E/F side.

And then there's the officers' dining room that sits right behind it with a secured door on that as well.

Q. Are officers in the dining hall with the inmates when they're eating?

A. Yes.

Q. And how many officers would be assigned to the dining hall?

A. Well, the policy calls for five as [27] well as one supervisor.

Q. Well, is the policy followed?

A. Sometimes. I mean, sometimes we're short.

Q. How many officers—how many corrections officers work for Burlington County Corrections?

A. I think our number is at 230—around 230 right now.

Q. Approximately 230?

A. 230.

Q. That includes supervisors or just CO's?

A. Just CO's.

Q. How many supervisors are there; do you know?

A. It's 34 or 33.

Q. Can you describe the different assignments that are unique to the BCDC?

A. Like jobs?

Q. Jobs, posts.

A. Well, a lot of the assignments basically coincide with BCDC and CWRC, the same jobs, but you can be a tier officer at the main jail.

* * *

[43] A. In the final offer, I believe they eliminated it completely.

Q. So without the bidding system, who would assign the posts?

A. Either it would be your shift supervisors or administration. You would walk in and somebody would just tell you where you're working.

Q. Do you have any knowledge of any officers who have been injured in the line of duty?

A. There's been several in the past ten years that I've been there.

Q. Any that you're aware of that have been seriously injured before compelled retirement?

A. Actually a few in the past. I think it's been three or four years. It's been more so than the past.

Q. Are you familiar with a situation involving Officer Jensen?

A. That's not Jensen. That's supposed to be Ernestine Scott. She was involved with an inmate in an altercation in the clinic area, leaving her with permanent neck and shoulder [44] injuries, causing her to retire.

Q. What about Officer Mack?

A. Officer Kelvin Mack was involved with one of the mental patients, so to say, mentally ill. He got struck in the back of the head twice with a cane which led to his early retirement.

Q. And Officer Cyphers?

A. She was involved in breaking up a fight in the chow hall area between two kitchen workers when she was assigned as a kitchen officer, injured her neck and forced to retire early.

Q. What about Sargent Ortiz?

A. Sargent Ortiz, to my recollection, believe she got hurt by an inmate in the detention area, sustained a back injury and had to retire early.

Q. Are you familiar with the situation involving Officer Frazer?

A. Yes.

Q. And what happened with Officer Frazer?

A. Officer Frazer was struck by an inmate several times, a high-ranking Blood member

* * *

[46] early 30's, early to mid 30's.

Q. Have you ever experienced inmates attempting to expose you to bodily fluids?

A. Some inmates do.

Q. What do they do?

A. Some of them will roll—you know, take feces balls and try to roll them under the door, or there's been officers at times that suspected they had urine thrown on them. It's kind of hard to confirm. That definitely happens, not as often, but it does.

Q. Are you familiar with the sick time policy that the administration has implemented regarding sick time verification?

A. Yes.

Q. And could you explain what your knowledge of that policy is regarding the verification part?

A. The verification part?

Q. Yes.

A. If you call out sick, it was always part of the policy that you were subject to attendance verification where they called your house to make sure that you're in your residence while you were sick. It was recently

* * *

APPENDIX B

ARBITRATION HEARING
CASE NO. IA-2009-115

COUNTY OF BURLINGTON

vs.

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL #249 CORRECTIONS OFFICERS

Arbitrator: Timothy A. Hundley

Computer-aided transcript taken stenographically in the above-entitled matter before DONNA ROSNER, a Certified Court Reporter, License No. XI001976, and Notary Public of the State of New Jersey, at the offices of Capehart and Scatchard, Laurel Corporate Center, Suite 300S, 8000 Midlantic Drive, Mount Laurel, New Jersey, on Thursday, June 10, 2010, commencing at 10:45 a.m.

* * *

[11] A. Yes.

Q. With the same weapon?

A. No, sir.

Q. What weapon do you carry off duty?

A. I have a Smith Wesson 4906, 9 millimeter.

Q. You're qualified with that weapon also?

A. Yes.

Q. As a transportation officer, do you at times have to take ill or injured inmates to the medical facilities?

A. Yes, to the emergency room. Sometimes they're admitted. We have to do hospital duty.

Q. What does "hospital duty" consist of?

A. When you're assigned hospital duty, you sit in the room with them while they're in the hospital.

Q. Are these inmates secured while they're in the hospital?

A. Yes. Yes, they are.

Q. How so?

A. They're handcuffed and shackled to [12] the beds.

Q. So feet and wrists?

A. Just feet.

Q. Just feet?

A. Yeah.

Q. Their arms are free?

A. Yes.

Q. And how many officers will sit with an inmate in the hospital?

A. Two.

Q. Is there a minimum number of officers who are engaged in transport?

A. Two.

Q. And what type of vehicle do you use to transport the prisoners?

A. The jail van.

Q. Does that have a secure area?

A. Yeah, a caged area.

Q. At times do you take more than one inmate?

A. Yes.

Q. When you have to transport an inmate for a medical, are you made aware if that inmate is infectious or carrying bloodborne pathogens?

A. Oh, no.

[13] Q. Are you given any protective gear?

A. No.

Q. In your 20 years—what facility are you assigned to?

A. The Mount Holly, the maximum facility, the main jail.

Q. Main jail?

A. Right.

Q. Is that what we've been calling BCDC?

A. BCDC, yes.

Q. In your—have you always been assigned to BCDC?

A. The majority of the time, yes.

Q. Sometimes you were at the minimum security facility?

A. Yes.

Q. How long were you at minimum?

A. Maybe a month, here or there.

Q. So 19-plus years at the maximum security facility?

A. Yes.

Q. Are you aware if there's—in your experience have you come across inmates who have had infectious diseases?

[14] A. Yes.

Q. What type of diseases?

A. Staph, hepatitis, AIDS, venereal diseases.

Q. Have you ever worked classification?

A. Yes.

Q. Do you currently work classification?

A. When there's no transportation, I do assist.

Q. Are you familiar with the process of the system that's in place for processing an inmate from the time he comes into the facility up through classification?

A. Yes.

Q. When an inmate is brought into the facility, what's the first thing that they are required to do?

A. Be searched, quelled, and changed over into a uniform.

Q. What is "quelled"?

A. It's a liquid they put on for lice. I believe it's lice.

Q. So it's a delousing formula?

A. Yes, sir.

AMICUS CURIAE BRIEF

AND
BRIEFS

JUN 27 2011

No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PSYCHIATRISTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are psychiatrists who together have extensive experience dealing with strip searches, including providing expert testimony and treating individuals who have suffered some form of psychiatric harm from strip searches. They also collectively have significant experience treating psychiatric traumas more generally, as well as experience with policies at penal institutions, including strip searches. More detailed information on each amicus appears in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

I. Strip searches threaten severe, often lasting psychological harm. This is because they involve an extreme intrusion on personal privacy. From a young age, we are taught that privacy—particularly in our own bodies—is of paramount importance, and that its invasion constitutes a serious indignity. This sense of entitlement to privacy is heightened with respect to particular parts of the body, for society demands that we keep these parts covered at nearly all times. A strip search, in which individuals reveal the most private parts of their bodies to complete strangers, is a privacy violation of the highest order, because privacy is integral to individuals' sense of self, and is closely tied with dignity and autonomy. That the person being searched must submit to this invasion against his

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[1] No counsel for a party authored any part of this brief and no person other than amici curiae and their counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief by submitting blanket letters of consent to the Clerk.

will only magnifies the feelings of powerlessness and loss of control.

The psychological harm occasioned by strip searches is well-documented in social-science literature. Scholars have reported that individuals subject to search experience post-traumatic stress symptoms, including shock, depression, anxiety, inability to sleep, and even suicidal tendencies. Expert testimony adduced in litigation confirms these results. Courts have long recognized that strip searches cause severe and pervasive psychological injury, even absent the coercion and intrusiveness present in this case.

Certain groups are particularly susceptible to psychological harm from strip searches. Women experience strip searches as a form of sexual violence, and thus are especially likely to feel humiliation and a sense of low self-esteem as a result. Likewise children are likely to suffer serious emotional damage from the trauma of a search. That these groups are especially vulnerable, however, does not mean that others are unlikely to suffer harm. On the contrary, it is rare that an individual can endure a strip search without suffering ill-effects, no matter how professionally the search is performed.

II. This Court has held time and again that a search can pass muster under the Fourth Amendment only if the need for that particular search justifies the intrusion on personal rights that it entails. The invasion of privacy associated with a strip search is so extreme that it cannot be justified in cases where individuals are arrested for minor, non-drug offenses. Absent individualized suspicion that such individuals are concealing contraband, there is no compelling need

sufficient to justify the psychological harm occasioned by the search.

ARGUMENT

I. STRIP SEARCHES THREATEN SERIOUS AND LASTING PSYCHOLOGICAL HARM TO THE PERSON SEARCHED

Under this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), a central factor in determining the constitutionality of a search is "the scope of the ... intrusion," *id.* at 559. With a strip search, the intrusion is so extreme that such a search frequently causes serious psychological damage to the target of the search.

A. Strip Searches Attack Fundamental Attributes Of A Person's Psyche, Including Privacy, Autonomy, And Dignity

The psychological harm inflicted by strip searches flows primarily from the violation of dignity and self esteem caused by the search. Humans have a powerful psychological need to be treated with dignity and respect. When they are instead treated without respect, when they are subjected to indignities, they almost invariably suffer shame and a loss of self esteem that can cause psychological problems. Few experiences are as grave an indignity as a strip search.

First, strip searches involve a severe intrusion of the privacy of the individual searched. While a person's privacy has many components, one of the most fundamental is the privacy of certain parts of one's body. It is difficult to overstate the degree to which this sense of privacy is ingrained in our psyche. From relatively early in our lives, we are taught that certain "private parts" of our bodies should virtually always be concealed from others. This teaching typically

comes through explicit statements (usually from parents) reinforced by daily observation of those around us: Almost no matter what the setting, all the people we see and interact with as children (and indeed throughout our lives)—parents, grandparents, other relatives, teachers, friends, and so on—invariably have their "private parts" covered. And whenever those around us engage in conduct that requires us to uncover those parts, be it using the bathroom or trying on different clothes, it is done behind closed doors. Then as we grow older, we come to understand that the law conveys the same powerful message regarding the privacy of our bodies and our right to keep them covered. *See generally United States* v. *Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978) ("In a civilized society, one's anatomy is draped with constitutional protections."). A person who removes another's clothing without the latter's consent, for example, is almost certainly guilty of a crime anywhere in the country. Indeed, so private are certain parts of our body that it is a crime to expose them to other people without their consent.

Moreover, while the privacy associated with our bodies is greatest as to their "private parts," it is not limited to them. Our society and culture place a high value on physical attractiveness. People who believe that their bodies do not conform to what is generally thought to be attractive—whether because they believe they are too fat, too thin, too wrinkly or otherwise aged, too pale, are disfigured, have unappealing marks or skin conditions, or for other reasons—commonly resort to keeping as much of their body as possible hidden by clothing.

In short, people have an extremely deep-seated sense of privacy in certain parts of their bodies. A

strip search is a complete violation of that deep-seated privacy. Suddenly the body parts that the person who is searched strives every day to shield from others' view must be completely revealed. It must be revealed, moreover, in front of a complete stranger, one who is not merely present but is actively and intensively scrutinizing those deeply private areas. Further, the subject is often required to take steps that heighten the exposure—and hence the humiliation and dehumanization—such as lifting the breasts or penis and testicles, squatting, bending over, or spreading the buttocks.

There is little question that this exposure constitutes a privacy violation of the highest order. It inevitably threatens psychological harm because privacy is central to our conception of ourselves as valuable individuals. *See* Magi, *Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature*, 81 Library Q. 187, 192 (2011) ("[P]rivacy is a fundamental right that enables people to think of their existence as their own and protects the individual's interest in becoming, being, and remaining a person." (internal quotation marks omitted)); Post, *Three Concepts of Privacy*, 89 Geo. L.J. 2087, 2092 (2001) ("[A]n invasion of privacy can constitute 'an intrinsic offense against individual dignity.'" (quoting Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 19 (2000))). Indeed, "[t]he right to privacy ... is essential to insure dignity and freedom of self-determination." *Privacy and Behavioral Research*, 155 Sci. 535, 536 (1967); *accord* Kupfer, *Privacy, Autonomy, and Self-Concept*, 24 Am. Phil. Q. 81, 82 (1987) ("[P]rivacy is essential to the development and maintenance of an autonomous self."). Moreover, "bodily integrity may be inextricably linked to con-

cepts of personal identity, so that a systematic deprivation of privacy and dignity can weaken the individual's sense of self." James, *Constitutional Limitations on Body Searches in Prisons*, 82 Colum. L. Rev. 1033, 1049-1050 (1982).[2]

Second, and closely related, a strip search involves not just an exposure but coercion. One or more agents of the state—generally in full uniform, sometimes armed, and always with the unquestioned authority to use force if necessary—is requiring the person being searched to submit to this most severe violation of privacy against his or her will. That undermines, and often eviscerates, the person's feeling of autonomy, of having control over his or her own body. And this in turn can cause great psychological harm, leading to a feeling of powerlessness, of being dominated, forced to submit to another. *See* Wallinger, *Autonomy Support 101*, 48 Duquesne L. Rev. 385, 386 (2010) ("[H]umans have three basic psychological needs which must be satisfied to ensure optimum health and well-being[, the first of which is] autonomy." (citing Ryan & Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 Am. Psychologist 68, 68 (2000))).

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[2] Justice Brandeis similarly commented on the fundamental nature of privacy, albeit in a different context, remarking that privacy is "the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds by Katz* v. *United States*, 389 U.S. 347, 353 (1967). And a plurality of this Court has more recently observed that "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality opinion).

It is the coercion—the forced stripping away of bodily privacy—that primarily distinguishes a strip search from virtually all other situations in which people expose their bodies to others. Two individuals who disrobe to engage in sexual activity with one another, for example, do so voluntarily. They also commonly do so simultaneously; this mutuality serves to further diminish the shame or discomfort that usually accompanies exposure of the body. (Nonetheless, individuals in this situation will often take steps—lowering the lights, for example—to address discomfort caused by the exposure.) Similarly, when a person exposes his or her body as part of a medical examination, it is done voluntarily. Even so, doctors are trained to minimize the inherent intrusiveness of the exposure. For example, doctors examining the entire body often have each body part exposed only during the time that it is actually being examined, rather than having the patient entirely naked (and thus excessively exposed) throughout the examination.

In sum, strip searches constitute a powerful assault on some of our most longstanding and deeply held psychological bulwarks, including the privacy of our bodies and our view of ourselves as individuals clothed in dignity and respect and with the power to control our bodies, and in particular decide who will see them and under precisely what circumstances. It is entirely unsurprising that the shattering of such deep-seated beliefs frequently causes psychological trauma.

B. Case Law And Academic Literature Are Replete With Evidence Of The Psychological Damage That Strip Searches Can Cause

The fact that strip searches commonly inflict psychological harm is well-documented in the social-science literature. As one commentator recently summarized, "[b]eing strip searched leaves people disgusted and annoyed, or worse, degraded, humiliated and paralyzed. Victims may feel helpless, indignant, and shocked, and may experience, for several years, psychological symptoms of trauma[.]" Ha, *Blanket Policies for Strip Searching Pretrial Detainees*, 79 Fordham L. Rev. 2721, 2740 (2011) (footnotes omitted). This is consistent with amici's personal experience, which includes interviews with or treatment of scores of strip search victims.

Nor is documentation of the psychological harm threatened by strip searches a new phenomenon. To the contrary, over twenty-five years ago, one observer reported that "[p]ost-search symptoms include sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions." McKeown, *Strip Searches Are Alive and Well in America*, 12 Hum. Rts. 37, 42 (1985); *see also id.* ("Victims suffer a sense of helplessness and indignity but are often too shocked to be outraged."). Individuals subjected to a strip search can even be driven to attempt suicide. *See id.* at 37-38, 42.

The psychological harm from strip searches is also borne out in the case law. Parties who seek redress after being subjected to one or more strip searches commonly adduce expert testimony regarding the psychiatric harm inflicted on them by the search or

searches. "Psychological experts have ... testified that [adult] victims often suffered post-search symptoms including sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions, and that some victims have been moved to attempt suicide." Shatz, *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991) (internal quotation marks omitted).[3]

For example, in *Lee* v. *Ferraro*, 284 F.3d 1188 (11th Cir. 2002), a young woman was strip searched following her arrest by a male police officer "for improperly honking her car horn on a busy city street during rush hour," *id.* at 1190. As part of her lawsuit against the officer, she presented testimony from a psychologist who diagnosed her with post-traumatic stress disorder (PTSD) stemming from the strip search and overnight detention that followed. *See id.* at 1192.[4] Similarly, in *Adedeji* v. *United States*, 782 F. Supp. 688 (D. Mass. 1992), a woman who was subjected to a strip search and body-cavity search by airport customs officials presented psychiatric testimony (from one of the signatories of this brief) that the incident led her to suffer from PTSD, *see id.* at 701-702. Crediting this testimony, and rejecting the defense's contrary expert testimony regarding the source of the

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[3] Psychiatric testimony regarding strip searches was offered in *Bell* itself. *See* 441 U.S. at 577 (Marshall, J., dissenting) ("A psychiatrist testified that the practice placed inmates in the most degrading position possible[.]").

[4] The lawfulness of the strip search in particular was not the subject of the plaintiff's complaint and hence the courts did not rule on its constitutionality.

PTSD, the court observed that "a strip search has the potential to be even more intrusive and humiliating to an individual than a body cavity search," adding that "[p]rotracted strip searches ... conducted by officious, uniformed strangers in an unfamiliar, small and windowless room certainly have the potential to be more psychologically damaging ... than a body cavity examination performed in a hospital by a trained physician," *id.* at 694 n.16.[5]

Case law also demonstrates that psychiatric harm arises from strip searches even when the searches do not bear all of the same elements of coercion or the same degree of intrusiveness as is present here. For example, in *Cole* v. *Snow*, 586 F. Supp. 655 (D. Mass. 1984) the strip searches were less coercive than those at issue in this case because they were conducted not on an inmate or detainee but rather on a visitor to a prison, *i.e.*, someone who had the ability to avoid any search by foregoing the visit. The court nonetheless found, based on the plaintiff's expert psychiatric testimony (again from a signatory to this brief and again over contrary expert testimony from the defense) that three strip searches of the plaintiff had caused her to suffer from post-traumatic stress symptoms as well as severe sexual dysfunction that would require years of therapy to correct. *See id.* at 665-667. With a decisive vote from then-Judge Breyer, the First Circuit af-

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[5] The court found that the customs officials' conduct violated the plaintiffs' federal and state constitutional rights. *See id.* at 702-703.

firmed this conclusion. *See Blackburn* v. *Snow*, 771 F.2d 556, 571-572 (1st Cir. 1985).[6]

Indeed, psychiatric harm has been shown even where the searches were of clothed inmates. In *Jordan* v. *Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), female inmates challenged a prison's use of "random, non-emergency, suspicionless clothed body searches," *id.* at 1522 (footnote omitted). The searches, in other words, were by male guards in which the inmates were physically touched but not required to undress. "The inmates presented testimony from ten expert witnesses on the psychological impact of forced submission to these searches by male guards, and related issues." *Id.* at 1525-1526. These experts "were unanimously of the view that some would suffer substantially." *Id.* at 1526. More specifically, one expert, "[a] psychologist specializing in psychotherapy for women testified that the unwilling submission to bodily contact with the breasts and genitals by men would likely leave the inmate 'revictimiz[ed],' resulting in a number of symptoms of post-traumatic stress disorder." *Id.*; *see also id.* at 1525 ("The district court found that there is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates from these searches, even if properly conducted." (internal quotation marks omitted)). The en banc court concluded that "[t]he record more than adequately supports the district court's finding of psychological harm [from

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[6] The First Circuit also affirmed the district court's ruling that the blanket strip-search policy at issue violated the Fourth Amendment. *See* 771 F.2d at 568-569; *Cole*, 586 F. Supp. at 661-662.

these searches], and the harm is sufficient to meet the constitutional minima." *Id.* at 1531.[7]

Even in cases in which expert psychological testimony was not explicitly discussed, courts around the country (and elsewhere) have long recognized the extreme psychological implications of strip searches. *See Redding* v. *Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008) (en banc) ("Along with our sister circuits, we have long recognized the psychological trauma *intrinsic* to a strip search." (emphasis added), *aff'd in part and rev'd in part on other grounds*, 129 S. Ct. 987 (2009). The Seventh Circuit, for example, long ago described strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission," adding that it could "think of few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely." *Mary Beth G.* v. *City of Chi.*, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal quotation marks omitted); *accord id.* at 1275 (lay testimony showed that the psychological effects of strip searches on the plaintiffs included "shock, panic, depression, shame, rage, humiliation, and nightmares, with lasting effects on each woman's life"); *Thompson* v. *City of L.A.*, 885 F.2d 1439, 1446 (9th Cir. 1989) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute.").

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[7] The en banc court also affirmed the district court's ruling that the searches violated the Eighth Amendment. *See id.* at 1531.

Other courts have likewise described a strip search as an "extreme intrusion" and "an offense to the dignity of the individual," *Roberts* v. *Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001) (internal quotation marks omitted); "a serious intrusion upon personal rights," *Chapman* v. *Nichols*, 989 F.2d 393, 395 (10th Cir. 1993); "a humiliating, degrading and traumatic experience," *R.* v. *Golden*, 3 S.C.R. 679 ¶ 83 (Canada 2001); and "thoroughly degrading and frightening," particularly when the search is of a person arrested for a lesser offense, *John Does 1-100* v. *Boyd*, 613 F. Supp. 1514, 1522 (D. Minn. 1985), *quoted in Justice* v. *City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992). Members of this Court have taken a similar view. *See Arruda* v. *Fair*, 710 F.2d 886, 887 (1st Cir. 1983) (Breyer, J.) (characterizing strip searches as a "severe if not gross interference with a person's privacy"); *Kelsey* v. *County of Schoharie*, 567 F.3d 54, 66 (2d Cir. 2009) (Sotomayor, J., dissenting) (quoting a victim's account of the experience as "humiliating" and "shameful" (internal quotation marks omitted)).[8] Amici's view, based on their extensive experience in this area, is that these courts' various assessments were entirely correct.[9]

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[8] Indeed, this Court has stated that "[e]ven a limited search of the *outer clothing* for weapons constitutes a severe, though brief, intrusion upon cherished personal security," one that "must surely be an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U.S. 1, 24-25 (1968) (emphasis added).

[9] In fact, searches can be so traumatic that they trigger or increase violent behavior, thereby undermining institutional security. *See, e.g.*, James, *supra* p.6, at 1050 & n.123. They also lead some inmates to forego visits with family and others. *See Bell*, 441

C. Certain Individuals Are Particularly Susceptible To Psychological Harm From Strip Searches

Certain people are especially likely to suffer psychological harm from strip searches. For example, strip searches pose a particular threat of psychological damage for women. "Strip searches of women prisoners are experienced as a type of sexual coercion, which ... undermines self-esteem and self-worth." McCulloch & George, *Naked Power: Strip Searching in Women's Prisons, in The Violence of Incarceration* 121-122 (Scraton & McCulloch eds. 2009); *see also id.* at 109 ("[F]emale prisoners[] experience [strip searches] as a form of sexual violence or coercion."). Indeed, "there is little doubt that strip searching produces feelings of humiliation in women." *Id.* at 112-113; *see also* Dobash, *et al.*, *supra* n.9, at 204 (female prisoners describe "the degradation and humiliation of the body searches"). One commentator has even described strip searches as "visual rape." Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. Marshall L. Rev. 273 (1979). And "[a]ccording to psychiatrists, victims/survivors of sexual humiliation often struggle with issues of shame and self-blame which undermine their sense of capability and autonomy." McCulloch & George, *supra*, at 113.

U.S. at 577 (Marshall, J., dissenting), 593 (Stevens, J., dissenting) (each citing the district court's finding); Dobash, *et al.*, *The Imprisonment of Women* 204 (1986). This undermines inmates' (and prisons') efforts at rehabilitation. *See, e.g.*, Naser & Visher, *Family Members Experiences with Incarceration and Reentry*, 7 W. Criminology Rev. 20, 21 (2006) ("[A] remarkably consistent association has been found between family contact during incarceration and lower recidivism raters.").

Children are also particularly vulnerable to psychological damage from strip searches. This Court has recently recognized the point: In *Safford Unified School District #1* v. *Redding*, 129 S. Ct. 2633 (2009), this Court quoted the professional view that strip searches of children "can 'result in serious emotional damage,'" *id.* at 2642 (quoting Hyman & Perone, *The Other Side of School Violence: Educator Policies and Practices that may Contribute to Student Misbehavior*, 36 J. Sch. Psychol. 7, 13 (1998)); *see also Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is ... a time and condition of life when a person may be most susceptible to ... psychological damage."). Other courts have long taken the same view. The Eleventh Circuit stated in one case, for example, that "'[c]hildren are especially susceptible to possible traumas from strip searches.'" *Justice*, 961 F.2d at 192 (alteration in original) (quoting *Flores* v. *Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *aff'd*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd on other grounds sub nom. Reno* v. *Flores*, 507 U.S. 292 (1993)); *see also Doe* v. *Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (per curiam) ("[The n]ude search of a thirteen-year-old child is ... a violation of any known principle of human decency.").

Although women, children, and other individuals—such as those with certain cultural or religious beliefs and survivors of domestic or sexual abuse, *see* Ha, *supra* p.8, at 2742 & nn.189-192—are especially vulnerable to psychological harm from strip searches, this does not mean that others are *un*likely to suffer psychiatric damage from undergoing a strip search. While it is true that not every person who is strip searched suffers lasting psychological damage, in amici's experience it is the rare person indeed who can

be subjected to a strip search without experiencing powerful negative effects.

Similarly, just as certain individuals are particularly susceptible to psychological damage from a strip search, certain types of strip searches threaten greater psychological harm than others. For example, a strip search conducted (as with petitioner's search at the Essex County Correctional Facility, *see* Pet. Br. 6) in view of individuals whose presence is demonstrably unnecessary (such as other detainees) is an even more humiliating and degrading experience than a search conducted in a private location. Similarly, searches that—like those in this case—follow and are connected to another highly traumatizing event (here, the improper arrest for a minor offense) can be particularly psychologically damaging. But the fact that some searches are in this respect more harmful than others should not obscure the fact that *every* strip search is inevitably a traumatic and potentially damaging experience. The deprivation of autonomy, invasion of privacy, and loss of human dignity are simply too great to be eliminated. This too is a point courts have long recognized. *See Hunter* v. *Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience." (citing *United States* v. *Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (en banc), and *United States* v. *Dorsey*, 641 F.2d 1213, 1217 (7th Cir. 1981))).

II. The Psychological Harm Frequently Inflicted By Strip Searches Precludes Their Use Against Those Arrested For Most Minor Offenses, Absent Individualized Suspicion

As noted, in *Bell* v. *Wolfish* this Court reiterated that determining the reasonableness of a search, and hence whether the search is permitted by the Fourth Amendment, "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. As explained above, the "invasion" associated with a strip search is extreme. And as also explained above, the psychological damage that such an invasion can cause is likewise extreme. This is particularly true for an individual, like petitioner, arrested for a minor offense. For nearly all such individuals, a strip search is far beyond the range of what is expected. When it occurs, the resulting shock boosts the trauma caused by the search.

For purposes of the balancing required by *Bell*, this extreme intrusion and resulting harm could be outweighed only by the most compelling need for a search. As petitioner explains in his opening brief, no such need exists with individuals like petitioner, who was arrested for a minor non-drug offense and as to whom there was no individualized suspicion that weapons or other contraband were being concealed. The low likelihood that such an individual is in fact carrying prohibited items, and the even lower likelihood that any such items would not be detected by less intrusive means, demonstrates that there is simply no need for a strip search compelling enough to overcome the psychological harm such a search causes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2011

APPENDIX

Dr. Stuart Grassian is a Board-certified psychiatrist licensed to practice medicine in Massachusetts. He has interviewed and evaluated scores of individuals who have been strip searched. He has also repeatedly provided expert testimony, for both plaintiffs and defendants, regarding strip searches, including their psychological effects. He has also consulted or advised plaintiffs and defendants in cases involving strip searches.

Dr. James Gilligan is a clinical professor of psychiatry at New York University. He previously served for over thirty years as a member of the faculty of Harvard Medical School's psychiatry department. During that time, he also served as medical director of Massachusetts's prison hospital for the criminally insane and as director of the state's Prison Mental Health Service, which provided mental health care to all inmates in the state's prison system. More recently, as a member of the New York Correctional Association's Board of Advisers, he has participated in investigations of the treatment and mistreatment of mentally ill and suicidal prisoners in the New York state prison system, including appropriate and inappropriate decisions and policies regarding strip searches. He has also recently provided expert testimony in cases involving strip searches at jails in Chicago and Nassau County, New York.

Dr. Thomas Gutheil is Professor of Psychiatry and Co-Founder, Program in Psychiatry and the Law, Harvard Medical School. Recipient of every major award in the forensic field, as well as multiple teaching and writing awards, he is former president of the American Academy of Psychiatry and Law and current president of the International Academy of Law and Mental Health. . He is author or co-author of over two hundred

fifty publications, some of which have been translated into other languages, and many of which are used in almost every forensic training program in the country. An internationally known authority, speaker, and consultant on medico-legal issues, malpractice, liability prevention and risk management, Dr. Gutheil has served as consulting expert or expert witness in forty-two states.

Dr. Terry Kupers is Institute Professor at The Wright Institute and a Distinguished Life Fellow of the American Psychiatric Association. In addition to practicing psychiatry in Oakland, California, he provides consulting services for various public mental health centers and jail mental health services. He also provides expert testimony as well as consultation and staff training regarding the psychological effects of prison conditions including isolated confinement in supermaximum security units, the quality of correctional mental health care, and the effects of sexual abuse in correctional settings—including the psychiatric consequences of strip searches. He has served as a consultant to the U.S. Department of Justice, Civil Rights Division, as well as to Human Rights Watch and Amnesty International. He is Contributing Editor of Correctional Mental Health Report. He received the Exemplary Psychiatrist award from the National Alliance on Mental Illness at the American Psychiatric Association meeting in 2005, and the William Rossiter Award from the Forensic Mental Health Association of California, on March 18, 2009.

Dr. Douglas Marcus is Board certified in psychiatry and neurology. Among numerous other positions, he has served as senior attending psychiatrist and medical director of adolescent services at South Oaks Hospital in Amityville, New York, and as director of inpatient

services at the Division of Child and Adolescent Psychiatry, SUNY/Kings County Hospital Center. He has also served for over 25 years as a clinical supervisor of psychiatric residents and child fellows at North Short LIJ hospitals. His private psychiatric practice includes extensive treatment of individuals for various forms of psychological trauma.

Dr. Judith Ann Marcus is Board certified in adult psychiatry and neurology. She previously served as an assistant professor in psychiatry at the Einstein College of Medicine, and as an assistant clinical professor at Cornell University and the New York University School of Medicine. Her private psychiatric practice includes extensive treatment of individuals for various forms of psychological trauma.

AMICUS CURIAE BRIEF

No. 10-945

In The Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF CITY AND COUNTY OF SAN FRANCISCO, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The City and County of San Francisco (San Francisco) operates an urban jail system, consisting of six county jails, that books and processes tens of thousands of arrestees each year. The smuggling of contraband – including drugs and weapons – is a serious problem for San Francisco's jail system that jeopardizes the health and safety of its officers, employees, inmates, and visitors. Based on overwhelming evidence of contraband smuggling in its jails, including by arrestees for minor offenses such as property crimes, San Francisco believes that visual strip searches[2] of *all* arrestees are necessary to reduce the flow of contraband into jails and to ensure the well-being of inmates, employees, corrections officers, and visitors.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization of approximately 3,000 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

[2] The term "visual strip search" in this brief includes a visual body-cavity search.

international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. Because many local governments operate jails or other penal facilities, IMLA has a vital interest in the legal issues raised by this case.

The California State Association of Counties (CSAC) is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout California. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties in California.

SUMMARY OF ARGUMENT

Arrestees' smuggling of drugs, weapons, and other contraband presents a grave threat to the health and safety of inmates, employees, corrections officers, and visitors in local jails throughout the United States. To combat this threat, local jails

depend heavily on visual strip searches. Because arrestees often hide drugs and weapons in their body cavities, strip searches are often the only viable method for discovering these items. San Francisco's experience with a policy of visually strip searching all jail inmates housed with the general jail population demonstrates that arrestees often hide drugs and weapons in their body cavities – including those arrestees who are booked for offenses *not* involving drugs, weapons, or violence, such as minor offenses like trespassing, public nuisance, or shoplifting. In the judgment of San Francisco's jail administrators "'[t]he safety and well being of all inmates, staff and the public demand[ed] no less'" than strip searching all inmates. *Bull v. City and County of San Francisco*, 595 F.3d 964, 976 (9th Cir. 2010) (en banc).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court relied on far less evidence of contraband smuggling when it upheld the constitutionality of suspicionless strip searches of detainees after contact visits. Although *Wolfish* does not require that a correctional institution compile a substantial record of smuggling to justify its search policies, *see* 441 U.S. at 558-59 ("one instance . . . where contraband was found"), San Francisco, like other jurisdictions, has adduced evidence that drugs and weapons regularly are smuggled into jail and that visual strip searches (including visual body-cavity searches) are useful in detecting these items. The Court should therefore defer to the judgment of the experienced jail administrators in

this case and uphold the constitutionality of the suspicionless strip searches of petitioner.

ARGUMENT

I. WEAPON AND DRUG SMUGGLING IS A GRAVE THREAT TO HEALTH AND SAFETY THAT REQUIRES VISUAL STRIP SEARCHES TO COMBAT EFFECTIVELY.

Contraband smuggling plagues local jails across the country. Some contraband, like guns, knives, or other weapons, is "dangerous in and of itself." *Johannes v. Alameda Cnty. Sheriff's Dep't*, No. C 04-458 MHP (PR), 2006 WL 2504400, at *4 (N.D. Cal. Aug. 29, 2006) (internal quotations omitted), *vacated*, *Johannes v. Hernandez*, 328 F. App'x 444 (9th Cir. 2009); *see also* Diane Jennings, *Texas Prisons Contraband Troubled Officials Long Before Latest Crackdown, It Takes Many Forms; Inmates Often Make It*, *The Dallas Morning News* (Oct. 25, 2008), at 1A ("When inmates get their hands on weapons, death or injury usually follows."). Other contraband may seem innocuous, but "can be turned into a weapon." *Johannes*, 2006 WL 2504400, at *4. "Contraband can also consist of drugs, alcohol or other controlled substances." *Id.* The use of those substances in jails poses a serious health risk and leads to violent behavior. *See* Michael L. Prendergast, et al., *Reducing Substance Abuse in Prison: The California Department of Corrections Drug Reduction Strategy Project*, 84 Prison J. 265, 266 (2004). Finally, the jail "substance

trade strengthens prison-based gangs, leads to inmate-on-inmate violence, and increases inmate-on-staff member attacks." *Id.*; *see also Johannes*, at *4-5 (noting that inmates use contraband as currency).

Contraband smuggling also plagues prison systems, as illustrated by California's experience. In the latest data available, covering 2006, there were 14,490 inmate behavioral incidents in California's prisons, a rate of 9.2 incidents per 100 inmates. Of these reported incidents, 1,869 involved assault with a weapon, 1,238 involved possession of a weapon, and 1,005 involved a controlled substance. This averages more than 11 contraband incidents per day in California's prisons. *See* California Prisoners and Parolees, California Department of Corrections and Rehabilitation, at 34 (2006) (available at: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf).

Not surprisingly, this Court has recognized that "attempts to introduce drugs and other contraband into premises . . . [are] one of the most perplexing problems of prisons." *Hudson v. Palmer*, 468 U.S. 517, 527 (1984); *see also Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) ("Drug smuggling and drug use in prison are intractable problems."). Given these indisputable problems, this Court has recognized that evidence of a smuggling problem is not required to sustain the reasonableness of an institution's visual body-cavity search policy. *See Wolfish*, 441 U.S. at 558-59. Nonetheless, San Francisco has, as the Ninth Circuit recognized, developed a substantial record of

contraband smuggling in its jails and of the efficacy of visual body-cavity searches in detecting contraband.

Like other jurisdictions, San Francisco struggles with the problem of contraband in its jails. "[B]etween April 2000 and December 2003, searches of the San Francisco general jail population resulted in the discovery of 1,574 items of contraband, including 662 assorted controlled substance pills, 106 shanks and other weapons, 1 screwdriver, 17 jail-made handcuff keys, 42.88 grams of rock cocaine, 2.75 grams of powder cocaine, 6.70 grams of methamphetamine, 6.24 grams of tar heroin, 71.93 grams of marijuana, 4 ecstasy pills, 32 assorted pipes, 1 hypodermic needle, and 24 gallons of homemade alcohol known as 'Pruno.'" *Bull*, 595 F.3d at 966-67. This contraband "threatens the health and safety of inmates, corrections officers and jail employees." *Id.* at 967. For example, "an inmate housed in the general population" died "from drugs obtained within the prison." *Id.* Another arrestee "set her clothes on fire with a lighter smuggled into the cell," another "mutilated himself with staples similarly secreted into the jail," and "a third . . . attempted suicide with razor-blades smuggled into the jail in his rectal cavity." *Id.*

II. *ANY* ARRESTEE MAY BE SMUGGLING IN HIS OR HER BODY CAVITIES DRUGS OR WEAPONS THAT CAN ONLY BE DETECTED THROUGH A VISUAL STRIP SEARCH.

To combat its contraband problem, San Francisco had a policy of visually strip searching the body cavities of all arrestees classified for housing in the general jail population.[3] *See Bull*, 595 F.3d at 968. After giving "arrestees a reasonable time in which to post bond," *id.* at 977, San Francisco would automatically process, classify, and search the arrestee, *id.* at 968. San Francisco jail administrators adopted this policy because "the greatest opportunity for the introduction of drugs and weapons into the jail occurs at the point when an arrestee is received into the jail for booking and, thereafter, housing." *Bull*, 595 F.3d at 967 (internal quotations omitted).

In the course of litigating the constitutionality of this policy in *Bull* and other cases, San Francisco compiled a record showing the scope of its contraband

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[3] The "strip search was to be performed in a professional manner in an area of privacy by an officer of the same sex as the arrestee. The arrestee was required to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks or genitalia of the person. The search included a visual inspection of the mouth, ears, hair, hands, skin folds, [and] armpits as well as a thorough search of all clothing items. The policy authorized a visual search only; officers were not allowed to physically touch inmates' body cavities." *Bull*, 595 F.3d at 968-69 (internal quotations and citations omitted).

problem and the drugs and weapons found even on arrestees booked for minor offenses. This evidence amply demonstrates the need for San Francisco's former policy and establishes that even individuals arrested for minor offenses pose a significant security risk because they often secrete drugs and weapons on, or in, their persons.[4]

A. Arrestees Frequently Hide Weapons, Drugs, And Drug Paraphernalia In Their Body Cavities.

In *Bull*, 595 F.3d at 969, "San Francisco produced evidence that from April 2000 through April 2005 [visual] strip searches . . . resulted in the discovery of 73 cases of illegal drugs or drug paraphernalia hidden in body cavities" (internal quotation omitted). Many arrestees hid contraband in their rectal cavities or buttocks. Excerpt of Record, *Bull*, 595 F.3d 964 ("*Bull* ER"), Vol. III, at 463, 474, 476-80, 483, 487-88, 518-20, 522-24, 526-35, 547, 567-70, 577-82, 586-89,

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[4] Petitioner contends that California Penal Code § 4030(f) "prohibit[s] suspicionless strip searches." Brief for the Petitioner at 15 & n.6. He is wrong. *See Bull v. City & County of San Francisco*, No. C 03-0184 CRB, 2010 WL 3516099, at *3 (N.D. Cal. Sept. 8, 2010) (holding that San Francisco's visual strip search policy did not violate Cal. Pen. Code § 4030(f)); 2006 WL 449148, at *20 (N.D. Cal. Feb. 23, 2006) (holding that suspicionless searches do not violate Cal. Pen. Code § 4030(f) if the arrestee "is actually destined for the general jail population absent some unexpected reason for release."), *overruled on other grounds*, *Bull*, 595 F.3d at 964.

591-95, & 597-98. Female arrestees also regularly hid contraband in their vaginal cavities. *Bull* ER, Vol. III, at 481-82, 506-11, 517, 544, 551-52, 558-59, 604-05, & 607-08.

Drugs and other contraband discovered in the body cavities of arrestees included:

- "heroin," *Bull*, 595 F.3d at 969;
- "crack-cocaine," *id.*;
- "rock cocaine," *id.*;
- "marijuana," *id.*;
- "syringes," *id.*;
- "crack pipes," *id.*;
- "handcuff keys," *id.*; and
- lighters, *Bull* ER, Vol. III, at 526, 597-98.

Visual strip searches during that time period also uncovered "various concealed weapons, including":

- "a seven-inch folding knife," *Bull*, 595 F.3d at 969;
- "a double-bladed folding knife," *id.*;
- "a pair of 8-inch scissors," *id.*;
- "a jacknife," *id.*;
- "a double-edged dagger," *id.*;
- "a nail," *id.*; and
- "glass shards," *id.*

San Francisco's experience is not unique. In an *amicus* brief in support of San Francisco in *Bull*, San Mateo County Sheriff Don Horsley and the County of San Mateo (San Mateo) reported that during "a five-month period in 2004," they "seized forty-one items of contraband found during strip searches conducted in San Mateo Jails." *Bull v. City & County of San Francisco*, 539 F.3d 1193, 1211 (9th Cir. 2008) (Tallman, J., dissenting).[5] "Items confiscated as a result of these strip searches included the following: a hypodermic needle secreted in an arrestee's buttocks; a razor blade found in a woman's bra; a pocket knife found in a woman's bra; a small bag containing methamphetamine inside a woman's bra; suspected heroin secreted between an inmate's buttocks; and suspected methamphetamine secreted between an inmate's buttocks." *Id.* at 1211-2.

As this evidence demonstrates, arrestees often go to great lengths to smuggle drugs and weapons into jails. Indeed, in one incident, a glass pipe and lighter had to be surgically removed from an arrestee's rectal cavity. *Bull* ER, Vol. III, at 597-98. As a result, in many of the incidents, jail officials only discovered the contraband after a visual body-cavity search. Absent the search, the arrestees would likely have

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[5] Like San Francisco, San Mateo "had a policy of strip searching every arrestee who was going to be housed in San Mateo's general jail population." *Bull*, 539 F.3d at 1211 (Tallman, J., dissenting).

smuggled the drugs and weapons into the general jail population free of detection.

San Francisco did not provide evidence of every smuggling incident in its jail system from April 2000 through April 2005. *Bull* ER, Vol. III, at 431; *see also* Excerpt of Record, *Yourke v. City & County of San Francisco*, 252 F. App'x 179 (9th Cir. 2007) ("*Yourke* ER"), Vol. III, at 409. Nonetheless, even the limited sampling provided by San Francisco demonstrates "that arrestees' use of body cavities as a method of smuggling drugs, weapons, and items used to escape custody is an immediate and troubling problem. . . ." *Bull*, 595 F.3d at 975.

Although some arrestees may be unable to hide drugs or weapons before they are arrested, many others plainly are able to do so. As the Eleventh Circuit has explained,

> Not everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice. Some people surrender when they are notified that a warrant for them is outstanding. Those who do not turn themselves in often have notice that officers are coming to arrest them. Even those in a vehicle who are pulled over and arrested may have time to hide items on their person before the officer reaches the car door. Then there are those who deliberately get themselves arrested. Demonstrators or protestors engaged in civil disobedience are one example. Another example . . . is gang members who get themselves arrested so they can

> smuggle in contraband. They have all the time they need to plan their arrests and conceal items on their persons.

Powell v. Barrett, 541 F.3d 1298, 1313-14 (11th Cir. 2008) (en banc).

There is also a powerful economic incentive to smuggle contraband into jail. As Judge Tallman explained in his dissent to the original panel decision in *Bull*, "[w]e now know that inmates will go to great lengths to get contraband into jail facilities, where the contraband may be worth more than it is on the street." *Bull*, 539 F.3d at 1211, n.10 (Tallman, J., dissenting); *see also Johannes*, 2006 WL 2504400, at *5 ("'Drugs and other intoxicants are a very common form of contraband and command a high price within the jail. Even inmates who do not use drugs have incentive to smuggle them in because they are valuable commodities for purposes of barter and sale.'"). This smuggling of contraband by arrestees in their body cavities – which often can be discovered only through a visual strip search – is therefore a serious security risk for all jails.

B. Arrestees Who Are Not Booked For Crimes Involving Drugs, Weapons, Or Violence Regularly Attempt To Smuggle Drugs And Weapons Into Jails.

Contraband smuggling is not confined to arrestees booked for crimes involving drugs, weapons, or violence. There is, therefore, no reasoned basis to

distinguish between felony-arrestees and misdemeanor-arrestees as petitioner advocates. Any arrestee – including those booked for minor offenses – may attempt to smuggle contraband into jail, as confirmed by the evidence in San Francisco.

San Francisco's "smuggling problem is not isolated to those inmates booked for crimes involving drugs, weapons, or violence." *Bull*, 539 F.3d at 1205-06 (Tallman, J., dissenting). Jail officials regularly discovered contraband on arrestees charged with offenses that do not involve drugs, weapons, or violence – including minor offenses like trespassing, public nuisance, and petty theft. For example, officials found:

- five "white rock looking substances wrapped in a [o]ne [d]ollar [b]ill" and "one glass tube" in the buttocks of a woman arrested for violating two municipal codes, trespassing (S.F. Police Code § 25) and failure to appear (S.F. Police Code § 1559), App. 4-6;
- a "clear plastic bag containing [a] white powdery substance" in the shoe of a man arrested for illegal lodging (Cal. Pen. Code § 647j) and public nuisance (Cal. Pen. Code § 372), App. 27-31;
- "bindles of crack cocaine" ingested by a woman arrested for loitering for the purpose of engaging in prostitution (Cal. Pen. Code § 653.22) and public nuisance (Cal. Pen. Code § 372), App. 7-10;

- a "plastic bag" containing "two small white pills" in the mouth of a woman arrested for shoplifting (Cal. Pen. Code §§ 484(a) and 490.5) and forgery (Cal. Pen. Code § 475), App. 11-14;
- a "plastic baggie" containing a "white powdery substance" in the vaginal cavity of a woman arrested for receiving stolen property (Cal. Pen. Code § 496), App. 19-22;
- a "plastic bag" containing a "green and flaky" substance in the "anus" of a man arrested for auto theft (Cal. Pen. Code § 10851) and receiving stolen property (Cal. Pen. Code § 496(a)), App. 1-3;
- a "small white rock" suspected to be "cocaine" in the bra area of a woman arrested for petty theft with a prior (Cal. Pen. Code § 666) and theft (Cal. Pen. Code §§ 484(a) & 490.5), *Yourke* ER, Vol. III, at 427-28;
- "one small clear ziplock style bag containing a small amount of green leafy plant substance suspected of being marijuana" in the buttocks of a man arrested for second degree burglary (Cal. Pen. Code § 459), App. 15-18;
- a "[y]ellow piece of paper containing a small piece of rolled leafy substance" and a "baggy containing [a] green leafy substance" in the "anus" of a man arrested for burglary (Cal. Pen. Code § 459),

attempted burglary (Cal. Pen. Code §§ 459A, 664), resisting an officer (Cal. Pen. Code § 148(a)(1)); and trespass (Cal. Pen. Code § 602(e)), App. 23-26; and

- a pair of 8-inch scissors found on a man arrested for burglary (Cal. Pen. Code § 460), App. 32-33.

For each of these incidents, there is *no* evidence in the record that the arrestee was or could have been searched based on "individualized circumstances," "the nature of the offense (such as crimes involving drugs or violence), the circumstances of the arrest (as when it appears that the inmate hid materials or was attempting to gain admission to jail), or the [arrestee's] prior criminal history." Brief for Petitioner at 32-33.

In nearly all of the incidents identified above, jail officials discovered the contraband solely because of the visual strip search. *See, e.g.*, App. 1-6, 15-26. There is no doubt that "San Francisco faces a serious smuggling problem and the problem is not isolated to those offenders arrested for crimes involving drugs, weapons, or violence." *Bull*, 539 F.3d at 1210, n.9 (Tallman, J., dissenting) (internal citations omitted).

It is not surprising that even minor offenders may be hiding contraband. Drug users typically commit minor property crimes like shoplifting and often avoid "person-related acquisitive crimes such as street robbery and snatch theft." Chris Allen, *The Links Between Heroin, Crack Cocaine and Crime*, 45

Brit. J. Criminology 355, 366 (2005); *see also* Arthur J. Lurigio & James A. Swartz, *The Nexus Between Drugs and Crime: Theory, Research, and Practice*, 63 Fed. Probation, June 1999, at 67, 68 (noting that "the need for money to purchase drugs is a motivating factor for criminally-active drug users"). Federal studies confirm this. Even though 60 to 80 percent of arrestees have drugs in their system at the time of arrest, *see* Office of Nat'l Drug Control Policy, Exec. Office of the President, ADAM II 2010 Annual Report (2010), at 38, the greatest proportion of their arresting charges is property crimes or other minor offenses, *see id.* at 14, 45; *see also* U.S. Dep't of Justice, Office of Justice Programs, 2000 Arrestee Drug Abuse Monitoring: Annual Report (2000), at 118 (table showing that 41.7 to 82 percent of females arrested for minor offenses in 29 different jurisdictions in 2000 had drugs in their system at the time of arrest). Thus, neither the minor nature of the charges nor the absence of a serious criminal history supports the assumption that a particular arrestee is not hiding drugs, drug paraphernalia, or weapons on his or her person. Instead, as shown by the evidence of contraband smuggling in San Francisco, jail officials have every reason to believe that *any* arrestee could be smuggling drugs or weapons into the jail.[6]

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[6] "[T]o limit their liability," San Francisco jail administrators changed San Francisco's visual strip search policy on January 21, 2004. *Bull*, 595 F.3d at 988 (Kozinski, J., concurring). Under the new policy, San Francisco no longer automatically

(Continued on following page)

III. THE OVERWHELMING EVIDENCE OF CONTRABAND SMUGGLING IN SAN FRANCISCO JUSTIFIES SUSPICIONLESS STRIP SEARCHES OF ARRESTEES UNDER *BELL V. WOLFISH*.

The evidence of contraband smuggling in San Francisco jails is representative of jails throughout the country. Under *Bell v. Wolfish*, this is more than enough to justify suspicionless searches of all arrestees.

In *Wolfish*, 441 U.S. at 547, the Court held that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Applying this deference, the Court upheld a policy of visually strip searching the body cavities of all detainees following contact visits adopted by the Metropolitan Correctional Center (MCC), a short-term custodial facility. *Id.* at 560. It did so even though there had "been *only one instance* where an . . . inmate was discovered attempting to smuggle contraband into the institution on his person. . . ." *Id.* at 559 (emphasis added). Relying on "inmate attempts to secrete" contraband

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searched arrestees classified for housing in the general jail population. Its jail administrators, however, "express[ed] grave doubts about the new policy" and "believe[d] it 'increase[d] the danger to staff and inmates' and '[would] lead to a higher incidence of illegal contraband in the jails.'" *Id.*

"into the facility by concealing them in body cavities . . . [as] documented in this record . . . and in other cases," *id.* (internal citations omitted), the Court concluded that the MCC's institutional need to conduct suspicionless searches after contact visits outweighed the privacy interests of detainees, *see id.* at 560.

The evidence justifying suspicionless searches of arrestees in *Bull* is far stronger than the evidence used to justify suspicionless searches in *Wolfish*. "The record of smuggling" in San Francisco jails "far exceeds the showing in [*Wolfish*]." *Bull*, 595 F.3d at 975. That record "shows that arrestees do, in fact, have both the opportunity and inclination to conceal contraband in private bodily areas. . . ." *Id.* at 980. Thus, the risk of smuggling by arrestees is as great as, if not greater than, the risk of smuggling posed by "loosely supervised contact visits." Brief for the Petitioner at 37.

Indeed, petitioner's claim that "the policy challenged in *Wolfish* addressed a far greater risk of smuggling" rests on illusory distinctions. *Id.* "There is no denying that arrestees entering a detention facility usually have had plenty of contact with outsiders, most having been outsiders themselves until they were arrested." *Powell*, 541 F.3d at 1313. Moreover, unlike the prison administrators in *Wolfish*, "'officials at a county jail . . . usually know very little about the new inmates they receive or the security risks they present at the time of their arrival.'" *Evans v. Stephens*, 407 F.3d 1272, 1291 (11th Cir.

2005) (en banc) (Carnes, J., specially concurring) (quoting *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 48 (S.D.N.Y. 2003), *remanded on other grounds*, 103 F. App'x 688 (2d Cir. 2004)).

The evidence provided by San Francisco in *Bull* also demonstrates that suspicionless strip searches have a deterrent effect, a key factor under *Wolfish*. That evidence "establishes that San Francisco detected a substantial amount of contraband during strip searches of arrestees at the San Francisco jail, and also indicates that arrestees facing a strip search have jettisoned contraband in the holding cell." *Bull*, 595 F.3d at 980. This is more than sufficient to show "that a strip search policy may have a deterrent effect."[7] *Id.*

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[7] Citing a footnote in one of the district court opinions in *Bull*, petitioner contends San Francisco "continued to discover drug contraband at the same rate (once per month), but the rate at which it discovered weapons tripled (to once every five months)" after it changed its search policy. Brief of Petitioner at 34-5. But the district court did not make that contention in its footnote. *See Bull*, 2006 WL 449148, at *2, n.3. With good reason. San Francisco only provided the district court with an illustrative sampling of the smuggling incidents in its jails from April 2000 to April 2005. It did not provide a complete catalog of those incidents. *See* Excerpt of Record, *Bull*, 595 F.3d 964, Vol. III at 431; Excerpt of Record, *Yourke v. City & County of San Francisco*, 252 F. App'x 179 (9th Cir. 2007), Vol. III at 409. Any comparison of the rate of contraband discovery before and after San Francisco changed its search policy using the data before the district court is therefore meaningless.

In addition, San Francisco's evidence shows that "the alternatives suggested by" petitioner – *i.e.*, pat down searches,

(Continued on following page)

When confronted with the overwhelming evidence of contraband smuggling submitted by San Francisco in *Bull*, a majority of Ninth Circuit judges on the en banc panel concluded that "San Francisco produced undisputed evidence that the elimination of the strip search policy would 'lead to a higher incidence of illegal contraband in the jails,' and that implementation of more targeted policies 'requires supervisory and line staff training' that 'takes time away from other tasks and necessarily uses resources in scarce supply.'" *Bull*, 595 F.3d at 976. As a result, those judges found "no meaningful difference between the institutional concerns raised by contact visits in *[Wolfish]* and those raised by introducing arrestees into the general jail population. . . ." *Id.* at 980.

In *Wolfish*, 441 U.S. at 560, this Court upheld the constitutionality of suspicionless searches of detainees after "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates." In doing so, the Court deferred to the judgment of experienced prison administrators and relied on evidence of contraband smuggling from "other cases." *Id.* at 559. It should do the same here and uphold the constitutionality of the

---

metal detectors, the Body Orifice Scanning System, or the Canon RadPro SecurPass, *see* Brief of Petitioners at 31-32 – "would not be as effective as" visual strip searches, *Bell*, 441 U.S. at 559 n.40. Those alternatives would not detect "[m]oney, drugs, and other nonmetallic contraband" that San Francisco arrestees often hid in their body cavities. *Id.*

suspicionless searches of petitioner out of deference to the judgment of respondents' experienced jail administrators and based on the evidence of contraband smuggling by arrestees in *Bull*.

CONCLUSION

Based on the foregoing, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SAN FRANCISCO CITY
ATTORNEY'S OFFICE

DENNIS J. HERRERA
City Attorney
DANNY CHOU
Counsel of Record
ROBERT A. BONTA
VINCE CHHABRIA
CHRISTINE VAN AKEN
Deputy City Attorneys

Counsel for Amici Curiae City and County of San Francisco, International Municipal Lawyers Association, and California State Association of Counties

August 25, 2011

Report No.

RE: (PRINCIPLE PERSON INVOLVED)

#1949703

NATURE OF INCIDENT

Contraband Found During Strip Search

LOCATION

County Jail #9

DAY, DATE & TIME

Sunday, October 15, 2000@05:25 Hours

VERBAL REPORT TO	DATE & TIME
Sgt. Y. Doi #1042	10/15/00@05:27 Hours

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On Sunday morning, 10/15/00, I was assigned as Movement Coordinator. I strip searched custody while on duty and in full uniform as a San Francisco Deputy Sheriff. During my search, I noticed a plastic bag sticking out of anus. I asked him what it was but he kept saying it was nothing. I asked him to pull it out but he hesitated and resisted. I called for assistance from other deputies. was then asked again to pull out the plastic bag. became combative and he was restrained by deputies. then pulled out the plastic bag and threw it on the floor. I picked up the plastic bag and I notified a supervisor. was placed in a safety cell for being

combative. I unraveled the plastic bag and noticed the unknown substance to be green and flaky. Sgt. Doi asked Deputy Chu to call the arresting officer to find out whether he wanted to book in the contraband. Deputy Chu called and spoke to officer Nelson #2039. The officer was informed about the contraband and did not want to book the contraband. Sgt. Oaks told me to put the contraband in an evidence envelope and seal it and write TO BE DESTROYED on the outside of the envelope. Sgt. Oaks then had me take the envelope to the 4th floor of the Hall of Justice where the lab is located. I dropped the evidence envelope in the locked slot at the lab.

2.) -sf# 564747

Dep. B. Wan #1473

Sgt. Y. Doi #1042

Dep. C. Chu #1463

Sgt. E. Oaks #546

Officer Nelson #2039

DAY, DATE & TIME OF THIS REPORT Sunday, October 21, 2000 @ 23:15 Hours	☒ INITIAL ☐ SUPPLEMENTARY
COPIES TO ☒ FACILITY FILES ☐ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED ☐ YES ☐ NO

3.) N/A

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ B. Wan		1473	
B. Wan	8304	1473	

APPROVED BY	RANK	STAR
/s/ E. Oaks 0002		
Sgt. E. Oaks	8308	546

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT
/s/ Capt. T. Arata #370

****

10-15-2000 COURTNO : 01949703
RPTNO : 001220603
STAR : 2039/0691 SCA:
ARREST LOCATION : 23RD ST/MISSION ST

B290611 10-15-2000 10851VC/F
TAKE VEHCLE W/O OWNERS CONSENT
DISP : 10-17-2000
DA DISCH – RELEASED TO OTHER AGENCY/JURISDICT

B290612 10-15-2000 496(A)PC/F
REC/ETC KNOWN STOLEN PROPERTY
DISP : 10-17-2000
DA DISCH – RELEASED TO OTHER AGENCY/JURISDICT

**** FOR "AKA" OR ADDITIONAL ADDRESS INFORMATION, USE A "QPA" TRANSACTION ****

Report No.:

RE: (PRINCIPLE PERSON INVOLVED)

NATURE OF INCIDENT

4573,6 Possession of Controlled Substance in Jail

LOCATION

425 7th Street County Jail#9 Strip Room #2

DAY, DATE & TIME

Tuesday, October 17, 2000 @ 12:23 Hours

VERBAL REPORT TO	DATE & TIME
Sgt. Wong	10/17/00 @ 13:00 Hours

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On Tuesday October 17th, 2000 I (Deputy S. Parker #655) was on duty, in uniform assigned to Booking Search at CJ#9. While conducting a strip search on inmate , I asked her to spread her legs, bend over and spread her buttocks. I then saw a folded paper One Dollar Bill, and one glass tube protruding from her buttocks. I then instructed Inmate to slowly remove those items from her buttocks. Inmate complied, and removed the contraband. I completed the rest of the search without incident. I then escorted inmate to I.D. Processing.

Upon further review of the contraband, I found five (5) white rock looking substances wrapped up in a One Dollar Bill. I contacted SFPD Operations and received a case and lab number; then placed the suspected substance inside the evidence envelope and sealed it in wax, labeling it for destruction. I took the envelope to 850 Bryant, room 437 and deposited the envelope in the evidence drawer.

2.) J#1950004 B/F DOB: [Omitted] SF#518234

3.) 1 plastic bag containing 5 white rock like substance delivered to SFPD Analysis. Case Number: #001230674
Lab Number: #00182961

DAY, DATE & TIME OF THIS REPORT	☒ INITIAL ☐ SUPPLEMENTARY
Tuesday, October 17, 2000 @ 13:23 Hours	

COPIES TO ☒ FACILITY FILES ☐ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED	☐ YES ☐ NO

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ S. Parker			
S. Parker	8304	655	CJ #9

APPROVED BY		RANK	STAR
/s/ A. Wong	#810		
A. Wong		8308	810

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

/s/ [Illegible]

REPORT 6789 QCX) RUNS 05/[Illegible]
) @ [Illegible]
) CTN 1950004 SCN
) SFNO S518234
) INCN 000488763
) JAIL# 1950004 B/F
) DOB [Omitted]
DEFSTATUS CITN) MCN STRKS CELL
JAILST CITN 101700/1730) OPLIC

---------- KEY DATES ----------

ARR 101700 REBOOK) BRCN
/ /) BW / PSR
PROBSTAT) INTR PCD
SETBAIL $)

---------- SCHEDULED ON CALENDAR ----------

101800/0900 M88 AN

B291190 BKD TFWTXX /I NOW TFWTXX
/I W#00591273, $270, 1559, 25MPC

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* * * * * END OF REPORT * * * * *

Report No.

RE: (PRINCIPLE PERSON INVOLVED)

(J#1994703)

NATURE OF INCIDENT

possession of drugs by inmate

LOCATION

County Jail #9 saly port

DAY, DATE & TIME

Sunday, 07/08/01 @ 0825hrs

VERBAL REPORT TO DATE & TIME

Sgt. Bloom #1231 07/08/01 @ 08:45 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On Sunday morning, 07/08/01, at 0710 hours while in full uniform, I relieved Deputy Bautista at SFGH where he was guarding inmate (J#1994703, SF#556454, BFA, 01/04/79). had been sent out to the hospital because she admitted to medical staff to having ingested several bindles of crack cocaine.

Once she was medically cleared at SFGH I transported inmate back to CJ#9 at approximately 0817 hours. When I opened the right passenger side of the vehicle, inmate lunged out and threw up a large amount of the activated charcoal that she had been treated with at SFGH. Immediately she squatted and

searched through her vomit. She then took a small black covered bindle from the vomit and inserted it in her mouth. I then placed in a control hold and told her to open her mouth. At this point she stated "too late I swallowed it." I brought her in to County Jail #9 to be seen by medical. told R.N. Christian Kithchin that she had re-swallowed one of the original bindles that she had been sent out for treatment earlier that same morning.

I secured in a holding tank. I went to the area where she had vomited and retrieved two more bindles that she admitted to swallowing from the pool of vomit. I secured them in an envelope and submitted them to the lab for analysis. I informed that she would be charged for attempting to destroy evidence and for possessing a controlled substance where inmates are kept. I proceeded to "book" with penal code violations 135/M and 4573.6/F. the corresponding case number is 010810457 and lab number 01189842.

2.) Deputy Ramirez, J. #1486
R.N. Kithchin,C
Inmate (J#1994703 SF#556454)

3.) two plastic bindles with white chalky substance
Polaroid of area where bindles were found
Polaroid of the bindles found

DAY, DATE & TIME OF THIS REPORT Sunday, July 8, 2001 @ 08:45 Hours	☒ INITIAL ☐ SUPPLEMENTARY
COPIES TO ☒ FACILITY FILES ☐ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED ☐ YES ☐ NO

one copy of the field arrest card
xerox copy of analysis envelope

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ John Ramirez Ramirez, John	8304	1486	CJ#9

APPROVED BY	RANK	STAR
/s/ Barry Bloom Sgt. Bloom	8308	1231

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

/s/ Capt. T. Arata #370

[Field Arrest Card, Report Of Analyzed Evidence, And Photographs Omitted In Printing]

REPORT 6789 QCX) RUNS 05/07/06
) @ 09:18
) CTN 1994703 SCN
) SFNO S556454
) INCN 010809660
) JAIL# 1994703 B/F
) DOB [Omitted]
DEFSTATUS CITN) MCN STRKS CELL
JAILST CITN 071001/2126) OPLIC

---------- KEY DATES ----------

ARR 07801 REBOOK) BRCN
/ /) BW / PSR
PROBSTAT) INTR PCD
SETBAIL $)

---------- SCHEDULED ON CALENDAR ----------

070901/0900 M16 AN

C255541 BKD 653, 22APC /M NOW 653,22APC /M
LOITERING W/INTENT TO PROSTITU
COUNT PLEA / DISM 27
C255542 BKD 372PC /M NOW 372[illegible] M
MAINTAIN PUBLIC NUISANCE
COUNT PLEA / DISM 27

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* * * * * END OF REPORT * * * * *

Report No.

RE: (PRINCIPLE PERSON INVOLVED)

NATURE OF INCIDENT

NARCOTICS/CONTRABAND INTO COUNTY JAIL #9

LOCATION

425 7TH ST SAN FRANCISCO, CA

DAY, DATE & TIME

WED. AUG. 1, 2001 1645HRS.

VERBAL REPORT TO DATE & TIME

LT. BENOIT 08/08/01 @ 21:06 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On August 1, 2001 at 1645 hrs. I conducted a strip search on JAIL#1998781. When I asked her to open her mouth and lift her tongue, I saw a plastic bag in her mouth. When she moved her tongue the bag started to come out of her mouth. I removed the bag and saw two small white pills enclosed in the small clear plastic bag. I asked what it was and she told me "It's aspirin". When I again asked what they were, she stated that it was Clonodine.

I advised Lt. Benoit that I found contraband pills on and then showed the pills to medical

staff to see if they could identify the pills. Medical was not sure if it was Clonodine. I then called the arresting officer, Babbs #330, of Southern District Station, and advised him of the contraband pills found during the search. Officer Babbs arrived at 2100 hours and took custody of the pills from my possession.

2.) Persons Involved: Arresting Officer SFPD Babbs #330, Searching officer, SFSD Barbaria #1615, Custody, J#1998781

3.) Evidence: Two (2) white pills in small plastic bag, three (3) photos of contraband pills, copy of booking card.

DAY, DATE & TIME OF THIS REPORT Wednesday, August 1, 2001 @ 21:06 Hours	☒ INITIAL ☐ SUPPLEMENTARY
COPIES TO ☒ FACILITY FILES ☒ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED ☐ YES ☐ NO

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ [Illegible]		1615	
BARBARIA, MARIA #1615	8304	1615	

APPROVED BY	RANK	STAR
/s/ [Illegible] Benoit #731		
LT. BENOIT		

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

/s/ Capt. T. Arata #370

[Field Arrest Card Omitted In Printing]

	) RUN 05/07/06
	) @ [Illegible]
	) CTN 1998781 SCN
	) SFNO S558702
	) INCN 010913089
	) JAIL# 2053686 W/F
	) DOB [Omitted]
PD OLMO/S	) MCN 1194 STRKS
DEFSTATUS CUST	) CELL
JAILST FREE 081902/1330	) OPLIC A1715394 /CA

---------- KEY DATES ----------

ARR 080101 REBOOK	) BRCN CB00100477
COMP /080201	) BW D/061902 PSR
PROBSTAT –	) INTR PCD
SETBAIL $ 062802	)

---------- SCHEDULED ON CALENDAR ----------

062802/0900 M15 SN DOP,GTW
062602/0900 M15 CT SENTENCING, DOP
062102/0900 M15 HR1 12/BW
DISCP
061902/0900 M15 BW
120501/0900 M30 HR2 30/$100
VIF & PRF OF PRG, DOP
100301/0900 M15 PC
080201/0900 M15 AN

---------- REARREST INFORMATION ----------

TYPE	REARDATE	REBKDATE	DOCNO
MW	09/23/01 0035	09/23/01 0351	577099
MW	06/18/02 2000	06/18/02 2142	581911

BAMT	AGENCY	OFF1	OFF2	STAR
5,000	SFPD	550 SHEEHAN		1040
2,000	SFPD	1169		715
2,000	2142	LEE		

TOTALCTS 29D
C262086 BKD 484A4905PC/M NOW 484A4905PC/M
SHOPLIFTING
COUNT 1 PLEA NL /100301 FINDING G
DISPO 100301 ISS 17PC CTS 021D PJ 000 PROB /000 JLSS 0 JAIL 90D LAST APPEARANCE
062802 M15 SN DEF P/CUST
/TWS/CH1:CJ90D/CTS:29/VF1/X:SENTENCE TO BE SERVED IN COUNTY JAIL/

* * * * * END OF REPORT * * * * *

Report No.

RE: (PRINCIPLE PERSON INVOLVED)

SF#573227

NATURE OF INCIDENT

POSSIBLE DRUGS FOUND
DURING STRIP SEARCH

LOCATION

COUNTY JAIL #9

DAY, DATE & TIME

SUNDAY 01/27/02 @ 18:30 HOURS

VERBAL REPORT TO	DATE & TIME
SR. DEPUTY V. CHEW #809	01/27/02 @ 18:33 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On Sunday 01/27/2002 at 18:30 hours I was working my regularly scheduled shift, assigned to the position of booking search, at CJ #9. During the strip search of inmate J#2029048 I saw contraband concealed between the cheeks of his buttocks. I placed in handcuffs and told him I saw the contraband. said "It's marijuana and "I'll get it out". used his right hand dislodge the contraband from his buttocks and it fell to the floor. I used my right foot to move the contraband out of the dress-in room. I removed from the handcuffs and continued the search. No other contraband was found. I called my supervisor, Sr. Deputy V.chew to come

to the dress-in area and I showed him what I had found.

2.) Inmate J#2029048, DOB [Omitted],
SF#573227, BMA
Deputy P. Burt #1616
Sr. Deputy V. Chew #809

3.) One small white plastic type sack. One small clear plastic ziplock style bag containing a small amount of green leafy substance suspected of being marijuana.

The contraband was sealed in a evidence envelope. I labeled it "for destruction only". I deposited this envelope in the drop box at the crime lab on the 4th floor of the Hall of Justice.

DAY, DATE & TIME OF THIS REPORT Sunday, January 27, 2002 @ 18:33 Hours	☒ INITIAL ☐ SUPPLEMENTARY

COPIES TO ☒ FACILITY FILES ☐ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED	☐ YES ☐ NO

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ P. Burt #1616 DEPUTY P. BURT	8304	1616	CJ#9

APPROVED BY	RANK	STAR
/s/ Sr. Dep. V. Chew #509 SR. DEPUTY V. CHEW	8306	809

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

	) RUN 05/07/06
	) @ [Illegible]
	) CTN 2029048
	) SCN 184814
	) SFNO S573227
	) INCN 020116245
DA KHINE/M	) JAIL# 2029048 B/M
PD GOLDMAN/G	) DOB [Omitted]
DEFSTATUS XXXX	) MCN STRKS CELL
JAILST DLVD 061102/0949	) OPLIC

---------- KEY DATES ----------

ARR 012702	) BRCN
REBOOK 012902	) BW / PSR 050702
COMP /013002	) INTR PCD Y
INFO /022602	)
PROBSTAT -	)
SETBAIL $ 121703	)

---------- SCHEDULED ON CALENDAR ----------

121703/0900 S22 HR2 31/REMITTUR
060502/0900 S26 SN
050702/0900 S26 TR
041002/0900 S26 CT
031802/0845 S24 PC
022702/0900 S22 AN
021102/0900 M12 HR1 05/FELONY PRELIMINARY HEARING

TOTALCTS 131D
E208341 BKD 459PC /F NOW 459PC /F 2ND
DEGREE BURG
COUNT 1 PLEA NG /022702 FINDING G
DISPO 060502 ISS 17PC CTS 000 PJ 000 PROB
/000 JLSS 0 JAIL
SP 3Y/ /

121703 S22 HR 31/REMITTUR DEF NP/XXXX
LAST APPEARANCE
NEWPLEA OCCURRED
/TEXT:JUDGMENT AFFIRMED; REMITTUR
SPREAD UPON MINUTES/

* * * * * END OF REPORT * * * * *

Report No. 14702

RE: (PRINCIPLE PERSON INVOLVED)

SF 576227

NATURE OF INCIDENT

Found Contraband

LOCATION

County Jail #9 strip search stall

DAY, DATE & TIME

Sunday, June 23, 2002 @ 0410 Hrs.

VERBAL REPORT TO	DATE & TIME
Sgt. Oaks	06/23/02 @ 05:12 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On Sunday June 23, 2002 at approximately 0410 hours at CJ #9 while on duty and in full uniform, I, Deputy Castillo #1785 was strip searching inmate (Jail# 2054316). As I instructed to spread her feet wide, bend over at the waist, spread her buttock checks and vagina to cough. At first she was hesitant, I gave the directions again of what to do. She did and while she was bending over at the waist to cough, I noticed something sticking out of her vagina. I asked her again to bend over and cough so I can be sure I actually saw something. I asked to go ahead and pull out the plastic bag from her vagina. She pulled it out and handed it to me. I asked her to put it into a plastic bag

which she did and then she handed it to me. When I asked her again to bend over and cough, she said "that's all I have".

I then took possession of the clear plastic baggie with the white powdery substance that was placed inside a plastic zip lock bag and brought it to the attention of Sgt. Oaks. Two (2) photograph pictures were taken of the recovered baggie containing white powdery substance. I then placed the suspected narcotics into the Analyzed Evidence envelope and sealed it with wax. I hand carried the evidence and deposited it into the narcotics drop box on the fourth (4th) floor located at 850 Bryant Street.

was booked for 4573.6PC possession of a controlled substance where prisoners are kept.

2.) PERSON INVOLVED

. J#2054316 SF#576227

Deputy S. Castillo, #1785

DAY, DATE & TIME OF THIS REPORT Sunday, June 23, 2002 @ 05:12 Hours	☒ INITIAL ☐ SUPPLEMENTARY

COPIES TO ☒ FACILITY FILES ☒ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED	☐ YES ☐ NO

3) EVIDENCE:

2 Photographs of plastic baggie containing white powdery substance

1 plastic baggie containing white powdery substance

LAB #02198655

CASE #020745888

REPORTING OFFICER	RANK STAR	DETAIL
/s/ S. Castillo		
S. Castillo	Deputy 1785	
APPROVED BY	**RANK**	**STAR**
/s/ E Oaks		
E. Oaks	Sgt.	546

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

[Field Arrest Card Omitted In Printing]

) RUN 05/07/06
) @ [Illegible]
) CTN 2054316 SCN
) SFNO S576227
) INCN 020665333
) JAIL# 2054316 W/F
) DOB [Omitted]
DEFSTATUS FREE) MCN STRKS CELL
JAILST FREE 062502/1903) OPLIC

KEY DATES

ARR 062302	)	BRCN
REBOOK 062402	)	BW / PSR
PROBSTAT -	)	INTR PCD Y
SETBAIL $	)	

E251615 BKD 496PC /F NOW 496PC /F REC/ETC
KNOWN STOLEN PROPERTY
COUNT PLEA / DISM 24

* * * * * END OF REPORT * * * * *

Report No. 9-06-03-120

RE: (PRINCIPLE PERSON INVOLVED)

Inmate J#2113729

NATURE OF INCIDENT

Possession of contraband

LOCATION

CJ #9 strip search area

DAY, DATE & TIME

Tues., 06/17/03 0930 Hrs.

VERBAL REPORT TO	DATE & TIME
Sgt. Daggs #729	06/17/03 @ 10:11 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On 06/17/03 at 0930 hrs., I was conducting a strip search on inmate J#2113729. I asked to bend forward at the waist and spread his buttocks. appeared to be very agitated and did not comply with my orders. After several commands, complied and I saw a yellow piece of paper in his anus. I instructed him to remove the paper. complied and when he pulled the yellow paper out, a clear baggy containing some green leafy substance fell to the floor. I was unable to determine if he had anything else secreted. became argumentative and his demeanor was challenging and threatening to me. was placed in safety cell # 1 and was given a notice of rules violation.

2.) Inmate DOB: [Omitted], J#2113729
SFNO 369852

3) 1 Clear baggy containing green leafy substance (To be destroyed) (PHOTO OF NOTED ITEMS)

1 Yellow piece of paper containing a small piece of rolled leafy substance (To be destroyed) (PHOTO OF NOTED ITEMS.

DAY, DATE & TIME OF THIS REPORT	☒ INITIAL ☐ SUPPLEMENTARY
Tuesday, June 17, 2003 @ 10:11 Hours	

COPIES TO ☒ FACILITY FILES ☒ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED	☐ YES ☐ NO

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ B. Alviar			
B. Alviar	Dep.	732	

APPROVED BY	RANK	STAR
/s/ Sgt Daggs #729		
Daggs	Sgt	729

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

[Photograph, Field Arrest Card, And Prisoner Discipline Forms Omitted In Printing]

	) RUN 05/07/06
	) @ [Illegible]
	) CTN 2113729
	) SCN 190038
	) SFNO S396852
	) INCN 030727296
DA ROSS/J	) JAIL# 2113729 B/M
PD DOERING/H	) DOB [Omitted]
DEFSTATUS CUST	) MCN STRKS CELL
JAILST FREE 021804/0943	) OPLIC C1864953 /CA

---------- KEY DATES ----------

ARR 0161703	) BRCN
REBOOK 061803	) BW / PSR 092403
COMP /061903	) INTR PCD Y
INFO /072903	)
PROBSTAT GRANT –	)
102203	)
SETBAIL $ 102203	)

---------- SCHEDULED ON CALENDAR ----------

102203/0845 S24 SN
092503/1000 S24 CT
091903/0900 S22 TR TR/----TRIAL, LD 09-29-03
082703/1030 S22 PC
073003/0900 S22 AN
071603/0900 M09 HR1 05/PRELIM HRG,
DOP,NTW LD 7 17

TOTALCTS 128D
F249188 BKD 664459PC /F NOW 459PC /F 1ST DEGREE
COUNT PLEA NG /061903 DISM 74
F249189 BKD 594(B) 2APC/M NOW 664459APC /F VANDALISM UNDER $400
COUNT PLEA NG /073003 DISM 46
F249190 BKD 148(A) 1PC /M NOW 148(A) 1PC /M

OBSTRUCT/ETC PUB OFFICER/ETC
COUNT PLEA/ DISM 34
F249191 BKD 602 (E) PC /M NOW 602 (E)PC /M
TRESPASS/SOIL REMOVAL PUB PROP
COUNT PLEA / DISM 34
F260998 BKD NOW 664459PC /F N/A
COUNT PLEA / DISM 72
F260999 BKD NOW 664459PC /F N/A
COUNT 1 PLEA G /092403
DISPO 102203 ISS Y 17PC CTS 000 PJ 001Y
PROB FO/004Y JLSS 0 JAIL

---------- LAST APPEARANCE ----------

102203 S24 SN DEF P/CUST
/AJW/CH1:ISS:PROB 4 Y:PJ
1Y/CTS:128/WS/VF4:200/RESTV/SA2:HICKORY
ST,,SF/PC/PSR/BKFEE/OBEY/ACCEP/

* * * * * END OF REPORT * * * * *

Report No. 03J57

RE: (PRINCIPLE PERSON INVOLVED)

J#2103274; SF# 566121

NATURE OF INCIDENT

Drugs found on prisoner

LOCATION

425 7th Street, CJ#9 Strip-Search Area

DAY, DATE & TIME

Wednesday, November 19, 2003 @ 22:41 Hours

VERBAL REPORT TO	DATE & TIME
Lt. Garibaldi #386	11/19/03 @ 22:41 Hrs.

① NARRATIVE ② PERSONS INVOLVED (Subject, Suspect, Victim, Reportee, Inmate) ③ PROPERTY/ EVIDENCE INVOLVED

1.) On November 19, 2003 at approximately 2230 hours, I was conducting a strip-search on Inmate when I found a clear plastic bag containing a white powdery substance inside the tongue of his right shoe. Prior to the strip-search I asked Inmate a series of routine questions like, "do you have any drugs on you?" Inmate replied, "no, I don't have any drugs on me" to my question. I then took him to the first stall and asked him to remove his shoes first and hand them to me. Once he handed me his shoes I noticed he became nervous and was standing there watching me search his shoes. He told me, "watch out, they stink really bad". I then told him to remove the rest of his clothing so I could

search them too after I finished searching his shoes. I began searching his right shoe and I noticed that he did not hear me and was nervously focused on his right shoe. I squeezed the tongue of his right shoe and immediately felt that there was something hard inside. Inmate noticed that I found something inside the tongue and said, "there's nothing in there". I took a closer look at the shoe and noticed that there was a slit on the right side of the tongue and became suspicious. I then began to move the object inside up to the slit on the tongue and saw a clear plastic container. I immediately removed it and saw that it was a plastic bag full of white powdery substance. I secured the bag in my right pants pocket and confiscated his shoes and notified Lt. Garibaldi #386 of my findings. Deputy Lawsha #1526 completed the strip-search on Inmate and found no other contraband.

Once I suspected it was drugs, I called S.F. Police Department Operation Center and obtained an incident case number and a lab report number. I then placed the plastic bag which contained the white powdery substance inside an enveloped and sealed it and sent it to the lab for further analysis. I then notified Investigative Services Unit.

2.) Inmate J#2103274; SF#566121 DOB [Omitted]

3) Attachment:

Photograph of clear plastic bag containing white powdery substance with shoes included.

DAY, DATE & TIME OF THIS REPORT Wednesday, November 19, 2003 @ 22:41 Hours	☒ INITIAL ☐ SUPPLEMENTARY

COPIES TO ☒ FACILITY FILES ☐ ADMINISTRATION ☐ DA ☐ ___	FURTHER ACTION REQUIRED	☐ YES ☐ NO

Case #031360257; Lab Report #03211254

REPORTING OFFICER	RANK	STAR	DETAIL
/s/ Suguitan 1653			
Sugui-Tan	8304	1653	CJ9

APPROVED BY	RANK	STAR
/s/ Sgt. [Illegible] For 8308 #1042		
Lt. Garibaldi	8310	386

INCIDENT REPORT

SAN FRANCISCO
SHERIFF'S DEPARTMENT

[Field Arrest Card And Photographs
Omitted In Printing]

) CTN 2103274 SCN
) SFNO S566121
) INCN 030329284
) JAIL# 2103274 W/M
) DOB [Omitted]
PD PEARLMAN/B) MCN STRKS CELL
DEFSTATUS ORCT) OPLIC
JAILST DLVD 041504/0927)

---------- KEY DATES ----------

ARR 031903 REBOOK) BRCN
COMP /0422033) BW D/112003 PSR
PROBSTAT –) INTR PCD
SETBAIL $ 121103)

---------- SCHEDULED ON CALENDAR ----------

121103/0900 M15 HR1 30/JONES MTN DOP
112003/0900 M15 BW 110303 FTA PRETRIAL
(2ND BWI
110303/0900 M15 PC
042203/0900 M19 AN

---------- REARREST INFORMATION ----------

TYPE	REARDATE	REBKDATE	DOCNO
MW	10/19/03 0130	10/19/03 0349	610335
MW	11/19/03 1900	11/19/03 2013	620650

BAMT	AGENCY	OFF1	OFF2	STAR
5,000	SFPD	4160 MITCHELL		1815
5,000	OTHER	192 PINTOS	1 AMTRAKPD	1653

9336577 BKD 647(J)PC /M NOW 647(J)PC /M ILLEGAL LODGING
COUNT PLEA NG /112003 DISM 68
9336577A BKD NOW 372PC /M NA
COUNT PLEA NG /112003 DISM 68

9336577B BKD NOW 647(J)PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577C BKD NOW 372PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577D BKD NOW 647(J)PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577E BKD NOW 372PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577F BKD NOW 647(J)PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577G BKD NOW 372PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577H BKD NOW 647(J)PC /M NA
COUNT PLEA NG /112003 DISM 68
9336577I BKD NOW 372PC /M NA
COUNT PLEA NG /112003 DISM 68
---------- LAST APPEARANCE ----------
121103 M15 HR 30/JONES MTN DOP DEF P/ORCT
/
TEXT: DEFENDANT'S MOTION TO DISMISS FOR DELAY IN PROSECUTION PURSUANT TO JONES-SERNA/MO JONES/MO GRTD/

* * * * * END OF REPORT * * * * *

[LOGO]

San Francisco Sheriff's Department

INTER-OFFICE CORRESPONDENCE

CONTRABAND FORM

Case # 040-010-489

Name:	Jail # 2143344	SF# 562790

Date: 01-04	Time:	Found By: DEPUTY YAMBAO #1854

Item(s) Found: ABOUT 8" INCHES SCISSOR

☐ Pat Down/Wand Search ☐ Strip Search (Drugs/ Weapons/Violence, etc.

☒ Custodial Strip Search (Processed/ Classified) ☐ Safety Cell Placement ☐ Strip Search Authorization Form

CHECK ALL THAT APPLY:

☐ Incident Report Written ☐ SFPD Advised to Supplement Charges ☐ Sent to Lab for Analysis

☐ Charges Filed ☑ Item(s) Destroyed ☐ Sent to Lab for Destruction

☐ Items Placed in Inmate's Property ☐ Other _____

BKD:01-04-04

I/M
J# 2143344

[Photograph Of Scissors Omitted In Printing]

) CTN 2143344 SCN
) SFNO S562790
) INCN 040010489
) JAIL# 2143344 B/M
) DOB [Omitted]
) MCN STRKS CELL
DEFSTATUS DLVD) OPLIC
JAILST DLVD 010504/2210)

---------- KEY DATES ----------

ARR 010404 REBOOK) BRCN
/ /) BW / PSR
PROBSTAT –) INTR PCD
SETBAIL $)

---------- SCHEDULED ON CALENDAR ----------

010504/0900 M77 AN

G200945 BKD ENROUTEXX /M NOW ENROUTEXX /M SANMATEO#SM312436A3 46OPC $25K

* * * * * END OF REPORT * * * * *

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 26 2011
OFFICE OF THE CLERK

No. 10-945

In the Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE TEXAS ASSOCIATION OF COUNTIES, THE TEXAS MUNICIPAL LEAGUE, THE TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL, THE TEXAS CONFERENCE OF URBAN COUNTIES, AND THE TEXAS CHIEF DEPUTIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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August 26, 2011

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Law Library

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2, the Texas Association of Counties ("TAC" or "the Association"), the Texas Municipal League ("TML"), the Texas Municipal League Intergovernmental Risk Pool, the Texas Conference of Urban Counties, and the Texas Chief Deputies Association ("TCDA"), as amicus curiae, respectfully submit this Brief in support of Respondents. These amici request that the Court consider the specific safety concerns relating to local correctional facilities in determining whether conducting strip searches for contraband of all persons being booked into jails is reasonable pursuant to the requirements of the Fourth Amendment.

TAC is a non-profit corporation which serves counties across Texas. It was formed in 1969 with the purpose of creating a unified voice to represent county interests in the legislative process and inform and educate counties regarding issues that might affect them. Since its formation, TAC's mission has expanded to include providing educational resources to counties and their officials, acting as a liaison between the counties and other governmental entities, and providing technical assistance, and cost-effective risk management services. TAC's membership is made up of the counties themselves, rather than individual officials. TAC's legislative arm serves as the main link

---

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this Brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed written consent to the filing of *amicus* briefs pursuant to Rule 37.

between county officials and the State's elected officials by voicing members' concerns to legislators and by gathering, analyzing, and distributing vital information on legislative issues affecting county government. TAC assists counties with legal issues by providing members with a toll-free member hotline to assist officials in legal research relevant to counties' legal issues, and by distributing legal guides discussing issues such as election laws, open meetings, economic development, and constitutional issues. The Association also provides members with a wide variety of training opportunities relevant to the challenges governmental officials face. Additionally, TAC administers the TAC Risk Management Pool, whereby counties band together to self-insure against a broad range of potential liabilities including liabilities arising from the operation of county jails. The TAC Risk Management Pool is owned and managed by member counties, and has grown into a stable, sustainable resource of protection which has saved taxpayers millions of dollars over the years.

As a full-service organization providing support services of all kinds to Texas counties, TAC is in a unique position to observe and understand the security issues facing county jails and county officials. In providing educational, legal, and risk-management services to county sheriffs and county law enforcement officers, TAC has developed a significant understanding of the security problems and pitfalls which county jails face. These security problems include the daily smuggling of contraband into county jails by offenders of all categories. In an effort to ensure the security of both county officials and those detained in county jails, the types of searches which the Third Circuit found to be reasonable in this case

are necessary to ensure the safety of detention facilities.

The TML is a non-profit association of over 1,100 incorporated cities that provides legislative, legal, and educational services to its members. Approximately 350 of TML's member-cities operate some sort of detention facilities. As such, the holding in this case could significantly impact TML's members.

The Texas Municipal League Intergovernmental Risk Pool is a self-insurance risk pool created by over 2,600 participating governmental entities in the State of Texas under the provisions of the Interlocal Cooperation Act. TEX. GOV'T CODE ANN. § 791.001, et seq. (Vernon 2004). Of these participating governmental entities, over 1,100 are municipalities which self-insure their liabilities through the Texas Municipal League Intergovernmental Risk Pool. Many of these municipalities operate municipal jails.

The Texas Conference of Urban Counties is a nonprofit organization composed of thirty seven member counties, representing approximately eighty percent of the population of the State of Texas. The Texas Conference of Urban Counties was organized to provide services to its members, and regularly represents the interests of its members before governmental entities. All member counties of the Texas Conference of Urban Counties operate jails, and the operation of those jails will doubtlessly be significantly impacted by the decision of the Court in the present Appeal.

The TCDA is an organization made up of chief deputies and sheriffs from all over the State of Texas.

The purpose of the TCDA is to equip chief deputies with the skills necessary to assist sheriffs in the formation of operational policies for counties. Educational services provided by the TCDA include informing members about legal developments and education regarding a wide variety of topics related to the administration of county jails in Texas. Many of TCDA's members are charged with the administration of county jails, and will be affected by the decision of the Court in the present Appeal.

SUMMARY OF THE ARGUMENT

The Fourth Amendment safeguards the individual's right to be free from unreasonable searches and seizures. This Court has previously held that an individual's right to be free from unreasonable searches must be balanced against the need for a particular search. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). In addition to considering the privacy interests of the individual, courts must also consider factors such as the justification for the search. *Id.*

The types of searches which are at issue in the present Appeal are overwhelmingly necessary to maintain the safety of jails and correctional facilities. As discussed more fully, *supra*, these searches regularly uncover contraband which threatens the safety of both the inmates housed in jails and the law enforcement officers who work there. The safekeeping of those housed in correctional facilities and the safety of its employees weighs in favor of allowing the types of searches at issue in this Appeal. Any alternative methods of attempting to detect contraband on incoming inmates are technologically inadequate and

financially unworkable. Additionally, the Court should not rely on the American Correctional Association's ("ACA") Standards for searches. Jails are not required to follow the ACA's standards, and ACA accreditation is entirely voluntary. Furthermore, courts have declined to apply the ACA standards in determining if correctional facilities are subject to liability for alleged violations of individuals' constitutional rights.

There is an unmistakable and clear justification for the types of searches that are at issue in this Appeal. The rights of individuals to be safely housed in jails and the safety of the facility itself clearly weigh in favor of the types of searches which the Third Circuit found to be constitutionally sufficient.

ARGUMENT

a. Concerns for the safety of staff and inmates within correctional facilities outweigh individual privacy interests of those housed in them, and therefore render strip searches of all persons booked into jails reasonable under Fourth Amendment standards.

This Court has long acknowledged that jails are inherently dangerous places. *See Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (noting the proclivity amongst incarcerated persons toward violent and anti-social behavior); *Bell*, 441 U.S. at 559, 99 S. Ct. 1861 (jails are "unique place[s] fraught with serious security dangers"); *Baxter v. Palmigiano*, 425 U.S. 308, 321-23, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (limiting the right of

confrontation and cross-examination in prison disciplinary hearings due to the inherent dangers and hazards present in a correctional facility). Despite the grave dangers which are inherent in jail environments, corrections officials are charged with taking "reasonable measures to guarantee the safety of the inmates" as well as providing for their own safety. *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Against this backdrop of inherent danger, this Court has recognized that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence," and that attempts to smuggle such contraband into jails have been thoroughly documented. *Bell*, 441 U.S. at 559, 99 S. Ct. 1861. Clearly, smuggling of contraband into correctional facilities compromises the security of such facilities and poses an extreme risk of danger to detainees and corrections officers. The prevention of such smuggling is paramount.

The dangers related to the smuggling of contraband into jails are particularly obvious when considered in light of the large number of detainees who could potentially smuggle contraband into jails–and the relatively small number of jailers who are charged with keeping contraband out of jails. There are approximately 245 jails in Texas which are operated by counties. Adan Muñoz, *Tex. Comm'n on Jail Standards Agency Briefing Interim Charge #4, Prepared for the Tex. Senate Comm. on Criminal Justice*, p. 6, (Sept. 2010). Additionally, approximately 350 of the 858 police departments in Texas operate some sort of municipal detention facility. *Id.* at 9. As of August 1, 2011, approximately 70,120 inmates were being detained in county jails in Texas. Tex. County Jail Population Summ. Report, http://www.tcjs.state.

tx.us/docs/popsum.pdf (last visited Aug. 23, 2011). Texas' inmate population in August, 2011, represented an increase of 1,729 inmates from the previous month. *Id.* The average daily population of inmates in Texas jails as of August 16, 2011, was 60,938. Tex. Comm'n on Jail Standards Incarceration Report, p. 9 (Aug., 2011). In stark contrast, there are only 26,172 jailers currently permitted to work in Texas jails by the Texas Commission on Law Enforcement Officers Standards and Education. *See* http://www.tcleose.state.tx.us (last visited on Aug. 23, 2011).

It is clear that some type of search of detainees upon entry into correctional facilities is both necessary and reasonable. The breadth of such searches is at issue here. As noted above, analysis of an individual's rights under the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails[, including] . . . the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* In *Bell*, this Court held that strip searching inmates–including witnesses in protective custody who were not charged with crimes–was reasonable under the Fourth Amendment in light of the facility's need to prevent the smuggling of contraband into the facility. *Id.* at 524, 528, 99 S. Ct. 1861. Although this Court noted that "this practice instinctively gives us the most pause," it held that such searches do not violate the Fourth Amendment. *Id.* By definition, these searches were not based on reasonable suspicion. *See, e.g.*, *Powell v. Barrett*, 541 F.3d 1298, 1306 (11th Cir. 2008) (en banc) (*citing Bell*, 441 U.S. at 558, 99 S. Ct. 1861). *Bell* did not approach the constitutionality of these searches by first determining whether the offense for

which the inmate was arrested was minor, major, a misdemeanor, or a felony. *Id.*

The same factors that weighed in favor of allowing blanket strip searches in *Bell* also favor applying that general rule to all detention facilities. Indeed, the facilities' interest in safekeeping of inmates and protection of staff greatly outweighs individual privacy interests which may follow detainees into these inherently dangerous environments.

b. The security of jail facilities is compromised by easily-secreted contraband such as drugs, money, and cellular telephones.

It is a constant battle for correctional staff to keep contraband out of jail facilities. As noted, *infra*, the smuggling of contraband–especially drugs–is not limited to career criminals incarcerated for felony offenses. A brief internet search of news sources reveals several cases in the month of August, 2011, in which officers in both rural and metropolitan areas uncovered contraband during strip searches of non-felony detainees. On August 6, 2011, for instance, a twenty-eight year old woman was arrested and booked into the jail in Gaston County, North Carolina, for driving while her license was revoked and for failure to appear. Kevin Ellis, *Jail Strip Search Turns Up Drugs*, GASTON GAZETTE, Aug. 9, 2011. During a strip search of that individual, the suspect handed the searching officer a plastic wrapper containing thirty-four Alprazolam pills, commonly known as Xanax. *Id.* Overdoses of Alprazolam have been linked to deaths. At a jail in Zephyr Hills, Florida, Pasco County Sheriff's Deputies strip searched a woman who had

been arrested for false identification and possessing trace amounts of methamphetamine. Eric Waxler, *Deputies Find Drugs, Paraphernalia, and More During Strip Search of Woman, available at* http://www.abcactionnews.com/dpp/news/local_news/water_cooler/Deputies-find-drugs-paraphenalia-and-more-during-strip-search-of-woman (last visited Aug. 18, 2011). During the search, deputies found several bags of methamphetamine hidden in the suspect's brassiere, three syringes in her vagina and anus, and a ball of tin foil and spoon in her vagina. *Id.* In Memphis, Tennessee, jail officials conducting a routine strip search of a woman arrested for assault and disorderly conduct uncovered a piece of a paper bag containing crack cocaine in the woman's vagina. Stephanie Scurlock, *Jail Strip Search Reveals Drugs in Private Parts, available at* http://www.wreg.com/wreg-strip-search-drugs-story,0,6218047.story (last visited on Aug. 18, 2011).

In the aforementioned instances–and in many other such cases–jail officials would not have uncovered dangerous contraband had reasonable suspicion been necessary to conduct the strip searches. In the case in North Carolina, for instance, the Alprazolam which was discovered in the strip search could have caused a potentially lethal overdose to at least one person. The broad and recurring discoveries of contraband in the body cavities of "minor" offenders demonstrates a need for the types of searches at issue in the present appeal.

Unfortunately, these types of discoveries are becoming an all-too-common fixture during searches in local jails. Clearly, law enforcement officers have a keen interest in intercepting drugs and drug

paraphernalia before they are introduced to the jail's population. A brief review of news articles from the past year reveals why. In San Antonio, Texas, the family of an inmate recently sued the facility in which he was housed after he allegedly died from a heroin overdose. Guillermo Contreras, *Heroin Overdose in Federal Jail Prompts Lawsuit*, *available at* http://www.mysanantonio.com/news/local_news/article/Heroin-overdose-in-federal-jail-prompts-lawsuit-1241677.php (last visited on Aug. 18, 2011). In March, 2011, a man who was detained in the Sevier County, Tennessee, Jail for a charge of driving under the influence allegedly died of a hydrocodone overdose. *Autopsy Shows Sevier County Inmate Died of Drug Overdose*, *available at* http://www.wate.com/story/14305078/autopsy-shows-sevier-county-inmate-died-of-drug-overdose (last visited Aug. 18, 2011).

In short, the realities of criminal justice demand a policy of permitting strip searches of all inmates being booked into jails, regardless of the offense for which they are arrested or the presence of reasonable suspicion. Jails are faced with unprecedented numbers of detainees, and these detainees attempt to smuggle contraband into jails at alarming rates. Common experience dictates that it is reasonable to expect inmates to attempt to smuggle dangerous contraband into jails. Strip searching all incoming detainees is reasonable under the Fourth Amendment in light of the fact that jails are inherently dangerous places, jail officials are charged with the safekeeping of inmates, and many of the inmates attempt to smuggle dangerous contraband into jails. *See Bell*, 441 U.S. at 559, 99 S. Ct. 1861; *Hudson*, 468 U.S. at 526-27, 104 S. Ct. 3194. In balancing the benefit of these types of searches against the facility's need to

maintain the safety of inmates and staff, the overwhelming need to promote safety must prevail.

c. The suggested alternatives to strip searches are not feasible in light of the economic and practical realities of correctional facilities.

In the present appeal, Petitioner has suggested that alternatives to strip searches such as pat-down searches, metal detectors, and inventory searches may suffice to prevent the introduction of contraband into jail facilities. (Pet'rs Br., pp. 9-10.) This Court in *Bell*, however, questioned the usefulness of such alternatives by noting that "[m]oney, drugs, and other nonmetallic contraband still could easily be smuggled into the institution," despite the use of costly metal detection and body-scanning devices. *Bell*, 441 U.S. at 559 n. 40, 99 S. Ct. 1861 n. 40. Further, "the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id.* (quoting *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n. 12, 96 S. Ct. 3074, 3082 n. 12, 49 L. Ed. 2d 1117 (1976)) (internal brackets omitted).

Such alternatives, by their very nature, would not detect significant amounts of dangerous contraband. Furthermore, they are unworkable in light of current shortfalls in jail funding. Many jails across the country are experiencing severe budget shortfalls. In Androscoggin County, Maine, for instance, county officials are working to cut spending at the county jail in light of a $130,000 budget shortfall. Daniel Hartill, *Androscoggin County Tackles Jail Budget Shortfall*, THE SUN JOURNAL, June 24, 2011. Officials in Yakima,

Washington, project that their jail will encounter a $650,000 budget shortfall by the end of the year. Mark Morey, *Overflowing and Over Budget–Jail Faces $650K Shortfall*, THE YAKIMA HERALD, Aug. 7, 2011. Jail officials also project that cuts in community-based mental health programs will stretch their budgets even further. Brandi Grissom, *Jail Officials: Mental Health Cuts Hurt Everyone*, THE TEXAS TRIBUNE, Feb. 4, 2011. Jails are experiencing budget shortfalls which may prevent them from purchasing the types of equipment contemplated by Petitioner. Even if jails could devote resources to purchasing such equipment, however, it would still be insufficient to protect inmates and corrections officers from nonmetallic contraband.

In sum, the ineffectiveness of alternative methods of detecting contraband weighs in favor of a broad policy allowing strip searches to be conducted on all inmates being booked into jails. The alternatives simply do not offer the types of protection necessary to ensure the safety of inmates or staff.

d. The ACA Jail Standards are not binding on the Court or jails, and current ACA Standards should not be considered in this Court's decision.

This Court should not consider the ACA Standards as evidence that the types of searches ratified by the Third Circuit are *per se* unreasonable. First, the ACA has not filed a brief in support of Petitioner in the present Appeal. Second, this Court has not made a practice of relying on the ACA's opinions in previous decisions. In *Bell*, this Court held that the ACA Standards "simply do not establish the constitutional

minima; rather, they establish goals recommended by the organization in question." *Bell*, 441 U.S. at 543 n. 27, 99 S. Ct. 1861 n. 27. The Fifth Circuit has held that "it is absurd to suggest that federal courts should subvert their judgment as to alleged Eighth Amendment violations to the ACA whenever it has relevant standards." *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). The ACA guidelines are simply not binding to this Court.

The ACA's non-binding recommendation that its members only conduct strip searches upon reasonable suspicion is not persuasive. It is predictable that the ACA would recommend that its members only conduct strip searches upon reasonable suspicion of the presence of contraband in light of the unsettled state of the law regarding these types of searches. *See, e.g.*, *Roberts v. State of R.I.*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987); *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 621 F.3d 296 (3d Cir. 2010) (en banc); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982); *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195 (5th Cir. 1988); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). The ACA may be concerned that a contrary recommendation to jails would result in litigation for both the ACA and the jails it advises. A clear

statement from this Court that strip searches on intake are lawful would provide guidance for the ACA as well as the entities that operate these facilities.

Additionally, the ACA has both mandatory and non-mandatory guidelines. ACA, *Standards & Accreditation–Overview of the Process*, *available at* https://www.aca.org/standards/seeking/seeking_overview.asp (last visited on Aug. 18, 2011). The ACA does not require that facilities be in compliance with non-mandatory guidelines to be accredited. *See Spotts v. United States*, 613 F.3d 559, 571-72 (5th Cir. 2010). The ACA guidelines governing strip searches of arrestees are non-mandatory. ACA Guideline 4-ALDF-2C-03 (4th Ed. 2004) and 1-CORE-2C-01 (2010). Additionally, ACA "accreditation is entirely voluntary" and the ACA "has no authority to require that a correctional facility adopt or change any procedures." *Estate of Williams v. Am. Corr. Ass'n*, No. 1:06cv196LG–JMR, 2008 U.S. Dist. LEXIS 6306, at *2-3 (S.D. Miss. Jan. 27, 2008). It is also important to note that the ACA's standards permit strip searches if the inmate has had "contact with the public or exposure to public areas," seemingly regardless of the absence of reasonable suspicion. 1-CORE-2C-01; 4-ALDF-2C-03.

In short, this Court need not defer to the ACA's guidelines regarding strip searches. It is predictable that the ACA would advise members not to conduct suspicionless strip searches in light of the unsettled state of the law surrounding this issue. Even so, however, the ACA guideline regarding strip searches is non-mandatory. Therefore, the ACA's standards are not relevant to the Court's decision in this matter.

CONCLUSION

The types of searches at issue in this appeal are overwhelmingly justified in light of the dangerous nature of jails and the repeated instances of all types of offenders attempting to smuggle contraband into secured areas. Detainees' right to be safely housed in jail facilities–and the security of these facilities themselves–far outweigh the privacy interest of individuals being booked into jails. The need for safety and security of jails clearly weighs in favor of the types of searches which the Third Circuit found to be constitutionally sufficient. These types of searches comply with the Fourth Amendment. For the reasons stated above, the judgement of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully Submitted,

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